1-1-2008

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Recommended Citation
27 REV. LITIG.(University of Texas) 669 (2008)

An Empirical Study of Amicus Curiae in Federal Court: A Fine Balance of Access, Efficiency, and Adversarialism

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Abstract

During a recent telephone conversation, a colleague and I discussed whether the United States Supreme Court bears some resemblance to a quasi administrative agency. Of course, the Supreme Court is an Article III court, not an administrative agency. Yet, in more than 50% of the cases on the Court's docket, non parties are permitted to offer legal and/or factual information to supplement the legal and factual arguments made by the parties to the suit. Such non party participants, commonly referred to as amicus curiae – or "friends of the court," frequently raise new arguments that are totally absent from the parties' briefs. Moreover, the procedural requirements for permission to participate as an amicus are very lenient – at times virtually non existent. The Court's willingness to allow such non party participation and consider the information offered by such participants is more akin to the notice and comment period of administrative rule making than the party controlled adversarial model which we typically consider essential to our judicial system. This article considers why the system allows amicus curiae this privileged position and whether we should be rethinking the procedural mechanisms which apply to friend of the court briefs.

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I. Introduction

It has long been accepted procedure for amicus curiae to offer legal and factual insights that facilitate the court's decision making process. One of the more famous examples of the Court's willingness to accept such data is found in Muller v. Oregon, in which the Court upheld the constitutionality of a state law limiting the number of hours that female employees could work. In that case, Louis Brandeis, serving as counsel for the State of Oregon, filed a brief containing social science data regarding the detrimental effects of long work hours on women's health and asserting that the law at issue was necessary to protect women's health and safety.[2] The unanimous Court accepted the brief, notwithstanding the fact that it contained reports and data that were not part of the appellate record, and noted that the information showed "a widespread belief that woman's physical structure, and the functions she performs in consequence thereof, justify special legislation."[3] Amicus briefs have proven important in many other landmark cases declaring social policy, including Brown v. Board of Education in which the Court cited information offered by amici that segregation generates a feeling of inferiority

[2]Brief filed by Louis Brandeis at 11, Muller v. Oregon, 208 U.S. 412 (1908)(no.107); see also, Martha Davis, International Human Rights and United States Law: Predictions of a Courtwatcher, 64 Albany L. Rev. 417, 423 (2000)(Brandeis' brief was prepared largely by two activists, Florence Kelley and Josephine Goldmark, who collected data on women's work experiences).

[3]Muller v. Oregon, 208 U.S. at 420-21 ("Constitutional questions, it is true, are not settled by even a consensus of present public opinion, for it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking. At the same time, when a question of fact is debated and debatable, and the extent to which a special constitutional limitation goes is affected by the truth in respect to that fact, a widespread and long continued belief concerning it is worthy of consideration. We take judicial cognizance of all matters of general knowledge.")

among persons of color[4] and Roe v. Wade in which the Court relied upon information supplied by amici describing the risks of abortion and recounting beliefs concerning the beginning of life.[5]

Although non party participation by amicus curiae has been acceptable procedure in federal courts for quite some time, there has been a tremendous surge in amicus activity over recent decades. In fact, during the last half of the twentieth century, the Supreme Court saw an astonishing 800% increase in the number of amicus filings on its docket.[6] This increase manifested as an increase in the number of briefs filed as well as an increase in the number of participants cosigning the amicus submissions.[7] Several scholars have studied this tremendous surge in nonparty participation and established that the influence of amicus briefs on litigation success depends upon many factors, including for example the prestige and experience of the entity filing the brief (with the U.S. Solicitor General showing the greatest success), whether the brief supports the respondent or the petitioner (briefs supporting the respondents enjoy higher

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[4]347 U.S. 483 (1954).

[5]410 U.S. 113 (1973).

[6]Joseph Kearney, Thomas Merrill, The Influence of Amicus Curiae Briefs on the Supreme Court, 148 U. Penn. L. Rev. 743, 749 (2000). The federal courts of appeal have also seen a rise in the number of amicus filings, but a much less dramatic one. See John Harrington, 55 Case Western Reserve 667, 680 (from 1992 through 2002, the number of amicus filings at the federal courts of appeals increased 14.6%).

[7]Paul Collins, Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation, 38 Law & Society Review 807, 811 (2004)(While a variety of briefs may provide a court with legal and factual insights that are relevant to the issues in the case, the number of individuals or entities who cosign the brief merely provides additional endorsement value to the arguments presented therein.) In Webster v. Reproductive Health Services, 78 amicus briefs were filed (31 for respondents; 47 for petitioners). Of the more than 400 cosignors on the briefs, 335 filed on behalf of the respondents, and 85 filed on behalf of the petitioners. Id. at 812.

success rates), and the disparity in number of briefs offered for each side (a small number of briefs for one side with no briefs for the other side, sometimes translates into higher success rates; but larger disparities do not).[8]

This surge of amicus activity has given rise to concern among some judges.[9] Several circuit courts have criticized the lack of scrutiny that is common in granting leave to file amicus briefs and at least one circuit has articulated a policy regarding the limited types of amicus filings that it will allow.[10] In March, 2006, a federal circuit court refused to accept amicus briefs from three senators, even though none of the parties to the litigation opposed the filing.[11] Notwithstanding these concerns, at least one circuit court has expressed support for an open door model toward granting permission to file amicus briefs, expressly rejecting arguments that amici must be impartial and not motivated by pecuniary concerns.[12]

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[8]See Kearney & Merrill, supra note 6 at 749-750. Overall, the Kearney and Merrill study found that amicus briefs have a marginal impact on the outcome of litigation. See id. These statistics, however, may mask the fact that amicus curiae have had a significant effect on Supreme Court jurisprudence in particular cases, particularly those establishing important public polciy. See John Harrington, 55 Case Western Reserve 667, 675 (2005)(citing several Supreme Court cases in which the arguments presented by amicus curiae were cited and relied upon by the Court). Moreover, amicus curiae filed at the certiorari stage significantly increase the chances of the Court's granting the appeal. Harrington, supra note ―, at 684.

[9]Harrington, 55 Case Western Res. 667, at 670-672.

[10]Voices for Choices v. Illinios Bell Telephone Co., 339 F.3d 542 (7th Cir. 2003); National Organization for Women v. Scheidler, 223 f.3d 615 (7th Cir. 2000); Ryan v. Commodity Futures Trading Commission, 125 F.3d 1062 (7th Cir. 1997); see also American college of Obstetricians & Gynecologists v. Thornburgh, 699 F.2d 644 (3rd Cir. 1983).

[11]Boumedine v. Bush, docket 05-5062 (D.C. Cir. 2006)(the rejection of the senators' briefs was noteworthy in part because no other amicus filing in the case was refused).

[12]Neonatology Associates v. Commissioner of Internal Revenue Service, 293 F.3d 128 (3rd Cir. 2002).

In order to evaluate the varying views on amicus participation, we must consider the reasons that amicus curiae are seeking to participate in federal litigation in significantly greater numbers than they did 50 years ago. One important factor appears to be the ripening of the public law model of litigation. In 1976, Professor Abram Chayes identified an emerging model of public law litigation which focused on the vindication of constitutional or statutory policies rather than on private disputes.[13] He predicted that this model would lead to a significant power shift in favor of the judicial branch and would become a formidable tool in the public policy debate. Thirty plus years later, it is fair to say that his prediction has been realized. Public law litigation has responded to the most controversial social and political issues of our day -- including racial discrimination, affirmative action, abortion, free speech, church-state relations, and right-to-die cases, just to name a few – and amicus curiae have been actively involved every step of the way.[14] The continuing relevance of public law litigation in the twenty first century is evidenced by many recent events, including the Supreme Court's decision in Hamden v. Rumsfeld declaring constitutional limits of executive power in wartime, the Court's controversial eminent domain decision in Kelo v. City of New London,[15] and even by the confirmation hearings for Supreme Court Justices Roberts and Alito during which many Senators attempted to prognosticate whether a change in the composition of the Court would lead to a new interpretation of the right of privacy under the United States Constitution. These examples, and

[13]Abarm Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281 (1976).

[14]The Influence of Amicus Curiae Briefs on the Supreme Court, 148 U. Penn. L. Rev. at 755.

[15]125 S.Ct. 2655 (2006).

countless others, illustrate that public law litigation has played, and likely will continue to play, a significant role in driving the public policy debate.

The emergence of the public law model and its maturation over the latter half of the twentieth century, created a ripe environment for interested non parties to weigh in on the development of policy through the courts and the amicus brief provided the tool to accomplish this goal. Insights offered by amicus curiae tend to extend beyond the interests of the parties to the litigation – who are presumably adequately represented by their own lawyers – and are generally aimed at protecting the interests of individuals or organizations who are absent from the proceedings but whose interests are potentially jeopardized by the litigation. Given that public law litigation inherently extends beyond the specific interests of the parties to the litigation and prospectively changes widely applicable public policies, the amicus brief has provided a powerful tool for nonparty participation in public law litigation affecting the body politic.

If one considers the development of public law litigation as the fuel for the fire which ignited the amicus curiae blaze, the Federal Rules of Evidence and the Federal Rules of Civil Procedure played little or no role in controlling the flame.[16] Unlike traditional litigants who are

[16]See The Influence of Amicus Curiae Briefs on the Supreme Court, 148 U. Penn. 743, 761 ("The Court's current practice in argued cases is to grant nearly all motions for leave to file as amicus curiae when consent is denied by a party. Because the Court in recent years has routinely granted such motions, parties that are represented by experienced lawyers will in most cases consent to such filings, if only to avoid burdening the court with the need to rule on the motion. The effect of the Court's liberality in ruling on motions for leave to file, therefore, is to permit essentially unlimited filings of amicus briefs in argued cases.")

Of the almost fifty amicus briefs filed in Hamden v. Rumsfeld, the only amicus brief that the Supreme Court refused to accept was one that was filed out of time. (Motion for leave to file amicus brief out of time filed by Scott L. Fenstermaker, Denied, Mar. 20, 2006).

subject to the procedural rules which protect the fundamental values of our adversary system, amicus curiae are excused from the requirements of most procedural rules because they are deemed non parties. Specifically, traditional litigants must meet the requirements of justiciability and subject matter jurisdiction, both of which have constitutional underpinnings that define the judicial power and protect the constitutional separation of powers; amicus curiae need not meet the requirements of justiciability or subject matter jurisdiction. Traditional litigants must satisfy the Federal Rules of Civil Procedure for joinder of parties and claims, rules which protect the fair and efficient administration of the courts and define the scope of the "claim"; amicus curiae need not satisfy the rules for joinder because they are not "joining" the litigation as a party. Traditional litigants must garner and present evidence which satisfies the Federal Rules of Evidence, rules which attempt to protect the reliability of the evidence; amicus curiae are allowed to present some types of factual information without regard to the requirements of the Federal Rules of Evidence. Finally, traditional litigants are limited by the rules of res judicata and collateral estoppel from endlessly relitigating the same issues, rules which are based upon efficiency and credibility of the system; amicus curiae are not limited by the rules of res judicata or collateral estoppel.

In this article, I will analyze the role of amicus curiae in modern federal litigation. First, I will consider the historical development of the tool from its inception to the present as a means to understand the foundation upon which the current treatment rests. Second, I will analyze empirical data collected through a nationwide survey of federal judges to determine when amicus participation is most (and least) helpful to the bench. Third, relying upon the historical and empirical information, I will evaluate whether the relatively recent surge in amicus activity is a

serious incursion on the values of our adversary system, and whether prospectively we should consider a method for more vigilant policing of the amicus process.

II. Historical Analysis: From Then to Now

A. The Origins of Amicus Curiae

The role of amicus curiae – or "friend of the court" – enjoys a rich pedigree.[17] Dating back to Roman Law, the tool allowed an unbiased or neutral outsider to a legal action to provide information to an appellate court in a case to which the amicus was not named as a party.[18] Relatively loose procedural restrictions created a flexible doctrine that was capable of responding to a variety of needs.[19] For example, amicus curiae frequently provided impartial guidance on legal issues ranging from oral shepardizing,[20] to referencing the existence of a relevant statute or other source of law.[21]

Over time, amicus curiae evolved into third party representatives, less concerned with providing unbiased scholarly guidance to the court and more interested in protecting the interests

[17]Samuel Krislov, The Amicus Curiae Brief: From Friendship to Advocacy, 72 Yale L. J. 694, 695 (1962-63); Harper & Etherington, Lobbyists Before the Court, 101 U. Penn. L. Rev. 1172 (1952-53).

[18]Arthur Allen Leff, The Leff dictionary of Law: A Fragment, 94 Yale L. J. 1855, 2012 (1983).

[19]Id.

[20]Holthouse's Law Dictionary ("when a judge is doubtful or mistaken in matter of law, a bystander may inform the court thereof as amicus curiae. Counsel in court frequently act in this capacity when they happen to be in possession of a case which the judge has not seen or does not at the moment remember.").

[21]The Prince's Case, 8 Coke 1, 29a (1606).

of individuals or entities who were not named parties in a suit. This progression from neutral informant and servant of the court, to defender of third party rights marked a significant shift in the role of amicus curiae and opened the door for amicus curiae to take sides in a dispute advocating a particular position.[22]

The shift away from neutrality and toward advocacy accelerated under the federal system in the United States. [23] A strict interpretation of federal subject matter jurisdiction and a general hostility to intervention limited the ability of interested entities to formally participate in litigation in federal court and encouraged resort to the amicus curiae role.[24] Although the hostility toward intervention eventually softened and courts recognized that it was necessary to allow bystanders to intervene in a suit to protect their interests,[25] amicus curiae continued to enjoy relatively easy access in federal courts.[26]

The identity of the amicus curiae also changed. Originally, the role involved a

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[22]Krislov, supra note 17, at 695. (As noted by Professor Krislov "the amicus curiae brief early underwent changes that ultimately were to have profound repercussions. A step had been taken toward change from neutral friendship to positive advocacy and partisanship.")

[23]The first appearance of amicus curiae in American Jurisprudence occurred in Green v. Biddle,21 U.S. (8 Wheat) 1 (1823), when the State of Kentucky served as amicus curiae. See Michael Harris, Amicus Curiae: Friend or Foe? The Limits of Friendship in American Jurisprudence, 5 Suffolk J. Trial and App. Adv. 1, 4 (2000).

[24]Krislov, supra note 17, at 698.

[25]Id.

[26]Id. at 700. It is important to maintain the distinction between non party amicus curiae and intervenors. For example, in Florida v. Georgia, 58 U.S. (17 How.) 478 (1854), Chief Justice Taney suggested in a dissenting opinion that allowing the United States government to participate in a suit under the guise of amicus curiae status when in fact the government held a direct and real interest in the outcome of the case, would violate the subject matter jurisdiction limitations imposed by Article III.

professional relationship between the court and the individual amicus curiae (who may or may not have been a lawyer).[27] Organizations could not serve as amicus curiae.[28] By the early 1900's, however, courts began to identify an amicus brief according to the organization who sponsored it rather than according to the individual who drafted it.[29] This shift paved the way for influential groups to weigh in on the merits of a dispute by offering their endorsement to one litigant's position over another.[30]

As a consequence of these doctrinal changes, the amicus brief became a formidable tool in effectuation of social change through litigation. The Department of Justice was one of the first entities to effectively invoke the amicus device in pursuit of public policy change and, in the early part of the 20th century, state attorneys general[31] and minority groups recognized the opportunity to use the tool to shape public policy.[32]

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[27]Allison Lucas, Friends of the Court? The Ethics of Amicus Brief Writing in First Amendment Litigation, 26 Fordham Urb. L. J. 1605, 1607 (1999).

[28]Krislov, supra note 17, at 703.

[29]Id.

[30]Notwithstanding this shift in purpose, courts occasionally refused to accept amicus briefs on the ground that they were "excessively partisan" or the amicus curiae was "acting (though under disguise) not as a friend of the court but as a friend of one of the contestant litigants before said court". Id. at 704, 719.

[31]Id. at 707. Today, state attorneys general continue to actively participate in the public policy debate through amicus curiae and other procedural devices. Elliott Spitzer, as New York State Attorney General, is possibly the most well known activist attorney general, but there are many others who have orchestrated significant social changes on important issues such as sales of tobacco products, predatory lending practices, insurance practices, anti competitive practices, anti-telemarketing policies, and many more. Leonard Post, The National Law Journal, April 13, 2006.

[32]Id. at 707. In light of the increased role of litigation to vindicate minority rights, for example, civil rights organizations such as the ACLU and the American Jewish Congress

During the latter half of the 1940s and the early 1950s, the use of the amicus brief became so prevalent that at least some perceived them to be a "genuine problem" to the Supreme Court.[33] Characterized as "repetitious at best and emotional explosions at worst," the value added by such briefs was far outweighed by the inefficiencies created by them.[34] These attempts at judicial participation created the appearance that the Court was a "political legislative body, amenable and responsive to mass pressures from any source."[35] In an effort to respond to the problem, the Court in November 1949 amended its procedural rules regarding non governmental amicus participation[36] to require either consent of all parties or, if consent was not available, a motion requesting permission to file an amicus brief.[37] The rule change resulted in dramatically fewer amicus briefs reaching the Court.[38]

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became active filers of amicus briefs. Id. at 710.

[33]Harper & Etherington, 101 U. Penn. L. Rev. at 1172.

[34]Id.

[35]Id. The lack of any enforced guidelines regarding judicial participation by non parties gave rise to judicial lobbying in the form of picketing, post-cards, letters, telegrams and personal delegations to the Justices. See also, Krislov, 72 yale L. J. at 710.

[36]Governmental units were permitted to file amicus briefs as a matter of right both before and after the rule change.

[37]U.S. Sup. Ct. Rule 27-9 (1950). Although the rule which permitted amicus participation prior to this amendment required consent of the parties to the suit, this requirement was rarely followed and amicus briefs were routinely accepted without proof of consent.

[38]Harper & Etherington, U. Penn. L. Rev. at 1175 (noting that the Court went from "one extreme to the other" with regard to the acceptance of amicus participation); Krislov, 72 Yale L. J. at 713 ("[T]he Court's reaction to applications to file without consent of the parties: 'Such motions are not favored.'").

In the years following the promulgation of the new rule, the Court rejected amicus filings offered without consent in 39 instances and granted permission to such filings in only 12 instances. Krislov, supra note 17, at 713-14.

During the late 1960s and early 1970s, public law litigation emerged and amicus curiae participation once again surged.[39] For example, from 1965 to 1999 the percent of US Supreme Court cases which included amicus filings grew from 35% to 95%, and the number of amicus filings increased by over 800%.[40] During the late 1970s and 1980s, some courts began to expand the traditional role of amicus curiae beyond the mere presentation of information through written briefs to allow participation in discovery, introduction of evidence, and presentation of oral arguments.[41] Notwithstanding the occasional use of amicus curiae in these roles at the trial

[39]Professor Abram Chayes was one of the first scholars to recognize the importance of the public law model, suggesting that it would in time overshadow the relevance of the traditional litigation model. He described the traditional litigation model as a party controlled and party initiated system for resolving disputes by retrospectively evaluating a self contained episode and responding with the declaration of a compensatory remedy. He contrasted public law litigation to traditional litigation and noted several significant differences between the two models. Specifically, he noted that public law litigation tends to be less rigidly bilaterial and more likely to be structured inclusively by the parties and court; less retrospective and more prospective or legislative; less compensatory and more policy shaping; less party initiated and controlled, more judicially shaped and structured. Abram Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281 (1976).

[40]Kearney and Merrill, supra note 6, at 749-50 (at the beginning of the twentieth century, amicus filings were made in approximately 10% of the Supreme Court's cases; in recent years, one or more amicus briefs were filed in 85% of the Court's argued cases); see also Madeleine Schachter, The Utility of Pro Bono Representation of US Based Amicus Curiae in Non-US and Multi-National Courts as a Means of Advancing the Public Interest, 28 Fordham Int'l L. J. 88, 95 (2004).

[41]Frequently referred to as "litigating amicus", courts sought input from governmental entities and granted permission to them to actively participate as amicus curiae in complex civil rights cases. See e.g. Hoptowit v. Ray, 682 F.2d 1237, 1260 (9th Cir 1982)(U.S. Department of Justice requested by court to participate in case as amicus curiae with full party rights); Mashpee Tribe v. New Seabury Corp., 592 F.2d 575, 580 (1st Cir.)(U.S. Deparment of Interior requested to participate as amicus curiae/intervenor at trial), cert denied, 444 U.S. 866 (1979); In re Estelle, 516 F.2d 480, 482 (5th Cir. 1975)(United States permitted to participate as amicus with full party rights). The expanded role of government amicus curiae eventually spilled over to private individuals and organizations who sought to participate as non parties by serving as litigating amicus curiae. Michigan Prisons Case, 940 F.2d 143, 147 (6th Cir. 1991)(reviewing district court's decision to grant litigating amicus status which permitted nonparties to file motions,

court, the most common form of amicus activity today remains at the appellate level.

B. The Role of Amicus Curiae in Modern Litigation

At its most basic level, the amicus curiae tool allows an entity that is separate from the parties to provide legal or factual information to the court, creating an appearance of neutrality which may or may not be a reality. The information presented can range from a repetition of legal arguments already before the court (in essence, an endorsement backed by the prestige of the entity offering it) to the presentation of new legal arguments or facts that inform the court of potential impacts of the litigation.[42] More subtly, amicus curiae may play a strategic role by suggesting weak legal arguments that are morally appealing (if the argument is a loser, the party may disassociate itself from the position),[43] an educational role by presenting technical information that creates a fuller context for the court to decide the case, or a census role by providing a barometer of public opinion on an issue, particularly when a large number of entities are involved as cosponsors or separate filers of amicus briefs.

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present evidence, conduct discovery and seek enforcement of consent decree, among other things); United States v. Michigan (Michigan Fishing Rights Case), 471 F. Supp 192 (W.D. Mich. 1979), remanded, 623 F.2d 448 (6th Cir. 1980), modified, 653 F.2d 277 (6th Cir), cert denied, 475 U.S. 1018 (1986)(court permitted private litigating amicus curiae to participate in the settlement discussions, to help select a special master and to participate in discovery); Equal Employment Opportunity Commission v. Boeing Co., 109 F.R.D. 6, 8 (W.D. Wash. 1985)(court permitted non party to participate in a hybrid status falling "somewhere between that of an amicus and an intervenor"); Wyatt v. Stickney,344 F.Supp. 373, 374 (M.D. Ala. 1972), aff'd in part, rev'd in part sub nom. Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974)(ACLU as amicus curiae gave testimony, submitted briefs, proposed and negotiated remedies).

[42]Krislov, 72 Yale L. J. at 711.

[43]Id. at 712 ("...a weak legal argument, with a moral quality, forcefully presented by an 'outsider' will not detract from the force of the main argument... The amici should be providing arguments that will salvage the judges' consciences or square with their prepossessions should they lean toward holding for us....")

In light of the array of uses that amicus briefs may serve, it is not surprising that judges have expressed an array of opinions regarding the value of such briefs. For example, Justice Breyer has described the amicus brief as a valuable tool in educating judges, particularly on technical matters,[44] but Judge Posner has been critical of the inefficiencies created by amicus briefs, noting that "the vast majority of amicus briefs are filed by allies of the litigants and duplicate the arguments made in the litigant's briefs."[45] Justice Scalia has suggested that amicus curiae provide a type of interest group lobbying and has expressed concern that over representation by well organized interest groups has the potential to impact decisions by the Court.[46] These comments suggest that the value accorded to amicus briefs depends upon function that they are intended to serve.

There are two basic theories on the utility of amicus briefs: the affected groups theory and the information theory. The affected groups theory states:

> Insofar as the Justices are assumed to try to resolve cases in accordance with the weight of public opinion, they should look to amicus briefs as a barometer of opinion on both sides of the issues. Moreover, the information that amicus briefs convey about organized opinion is such that it can largely be assimilated simply by looking at the cover of the brief. The Justices can scan the covers of the brief to see which organizations care strongly about the issue on either side. The fact that the organization saw fit to file the

[44]Justice Breyer Calls for Experts to Aid Courts in Complex Cases, N.Y. Times, Feb. 17, 1998 (at A17).

[45]Ryan v. Commodity Futures Trading Comm'n, 125 F.3d 1062, 1063 (7th Cit. 1997).

[46]Jaffee v. Redmond,518 U.S. 1, (1996); Joseph D. Kearney, Thomas Merrill, The Influence of Amicus Curiae Briefs on the Supreme Court, 148 U. Penn. at 747.

brief is the important datum, not the legal arguments or the background information set forth between the covers of the brief.[47]

This is an interesting theory, in part because traditional jurisprudence would suggest that the judicial branch is to be insulated from majoritarian pressures, not subject to them. Yet, the judiciary's institutional legitimacy is ultimately dependant upon the influence of its decisions upon society. To the extent that the strength of the judicial system depends upon having its decisions followed and not overridden, altered or ignored, judges have an incentive to fit within the parameters of broadly shared public opinion.[48] Moreover, lacking the purse and the sword, the judicial branch is not equipped to enforce its decisions without the assistance of the other branches of government and the goodwill of the citizenry.[49] Thus, while the judicial branch is theoretically shielded from majoritarian forces, the practical reality suggests that some consideration of public opinion may be prudent.

Alternatively, the information theory suggests that amicus briefs are effective not because they provide a barometer of public sentiment but rather because they supplement the arguments of the parties by providing information not found in the parties' briefs.[50] Such supplemental information might present legal arguments from another perspective, present policy consequences of particular legal interpretations, describe common interpretations of relevant

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[47]Kearney and Merrill, supra note 6, at 785.

[48]Collins, supra note 7, at 812("To be sure, the justices only share policymaking authority with the other branches of government. Should they stray too far from the public opinion on an issue, it is likely that the legislature may attempt to alter or override their decision or the executive may indifferently enforce the decision.")

[49]Id.

[50]Id. at 815.

laws,[51] or present factual data such as social science information that is absent from the appellate record.[52] This theory is more inline with common thought that amicus briefs facilitate judicial decision making by educating the decision maker.[53]

In order to consider how each of these models might apply, we may look to the docket of Hamden v. Rumsfeld showing a list of almost 50 amicus curiae briefs. Perusing the list of amici provides a glimpse at the diverse interests represented by those entities who sought to participate.[54] If one were to strictly apply the affected groups theory, the Court could efficiently

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[51]James Spriggs & Paul Wahlbeck, Amicus Curiae and the Role of Information at the Supreme Court, 50 Political Research Q. 365, 372 (1997).

[52]Michael Rustad and Thomas Koenig, The Supreme Court and Junk Science: Selective Distortion in Amicus Briefs, 72 N.C. L. Rev. 91, 94 (1991). See also, David L Faigman, To Have and Have Not: Assessing the Value of Social Science to the Law as Science and Policy, 38 Emory L. J. 1005, 1079 (1989)("The legal relevance of social science research cannot be divorced from its scientific credibility").

[53]Collins, supra note 7 at 815-16.

[54]In Hamden v. Rumsfeld, docket 05-184 (2005), amicus briefs were filed on behalf of the following entities and individuals: National Institute of Military Justice; Office of Chief Defense Counsel; Retired Generals and Admirals; Human Rights First; Louis Fischer; United Kingdom and European Parliamentarians; Louis Doswald-Beck; Legal Scholars and Historians; Association of the Bar of the City of New York; Historians Jack N. Rakove, et al; International Law Professors; Urban Morgan Institute for Human Rights; Norman Dorsen; Brennan Center for Justice; William N. Eskridge Jr.; Richard A. Epstein, et. al.; General David Brahms and General James Cullen; Retired Generals and Admirals and Milt Bearden; Yemeni National Organization for Defending Rights and Freedoms; Binyam Mohamed; 422 Current and Former Members of United Kingdom and European Union Parliaments; Law Professors Richard I Aaron, et al.; Office of Military Commissions; Specialists in Conspiracy and International Law; Cato Institute; Bar Association of the District of Columbia; Lawrence M. Friedman, Jonathan Lurie, and Alfred P. Rubin; Center for National Security Studies; Law Professors Louis Henkin, et al.; American Civil Liberties Union, Bar Human Rights Committee of the Bar of England and Wales, et al.; american Jewish Committee, et al.; Professors Ryan Goodman, et al.; More than 300 Detainees Incarcerated at U.S. Naval Station, Guantanamo Bay, Cuba, et al.; Association of the Bar of the City of New York; Ibrahim Ahmed Mahmoud Al Qosi; Madeleine K. Albright and 21 Former Senior U.S. Diplomats; Certain Former Federal Judges; International Human Rights Organizations for Constitutional Rights, et al.; Professor Richard D. Rosen, Associate Dean and

gain the relevant information offered by these amicus briefs from merely looking at the entities who were interested enough to file a brief and counting the "votes" on either side (every amicus brief is required to identify the party that they support on the cover of the brief, thus making the vote counting quite straight forward). To the extent that the affected groups theory attributes significance to the fact that an entity had sufficient interest to invest the time, energy and resources in filing a brief, this theory fails to account for the fact that certain interested groups will fail to file an amicus brief due to lack of resources, not lack of interest. Moreover, a mere "counting"of votes discounts the true value of the judicial process which is to deliberate through facts, law and policy to reach a thoughtful decision, not to survey public opinion. The information theory, on the other hand, would suggest that a greater potential value would be gained by considering the content of the briefs to determine if the substantive information offered will assist in the decision making process. Yet, the information theory fails to take into consideration the perspective of the entity offering the information. Thus, the information theory suggests that substantive information is equally valuable whether it is offered by an amicus curiae who has a direct interest or one who has no interest in the underlying issue at all. While neither theory alone explains the utility of amicus briefs, together these theories suggest that both the information provided and the perspective from which it is offered are relevant considerations

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Director of Center for Military Law and Policy, et al.; National Association of Criminal Defense Lawyers; Arthur R. Miller; David Hicks; Former Attorneys General of the United States, et at.; Senators Graham and Kyl; Washington Legal Foundation, et al.; American Center for Law and Justice; Citizens for Common Defence; Criminal Justice Legal Foundation.

in evaluating the utility of amicus briefs.

III. Empirical Analysis: A View From the Bench

Any analysis of the value added by amicus curiae would be incomplete without input from the decision makers who receive and ponder these briefs in relation to cases that must be decided. In an effort to collect such data, I designed a survey to collect insights, thoughts and experiences from federal judges at various levels of the federal judiciary. In drafting the survey, I attempted to reduce the possibility of survey error as much as possible. First, in light of the relatively small number of federal judges at the Supreme, Circuit and District Courts, I decided to collect my data from the entire population, thereby reducing potential sampling error. Specifically, I sent the survey to 10 U.S. Supreme Court Justices (including recently retired Justice Sandra Day O'Connor), 252 U.S. Circuit Court Judges, and 973 U.S. District Court Judges. Second, by surveying the entire population I was able to significantly reduce potential coverage error. Coverage error occurs when the list from which a sample is drawn fails to include all elements of a population, thus skewing the survey by failing to give all elements of the population a chance at participation.[55] Given that I sent the survey to the entire population, the only potential coverage error would result from an incomplete or inaccurate list of the population or an administrative glitch in the mailing of the surveys. While I cannot guarantee a coverage error of zero, I am confident that the survey provided a close to equal chance for all elements of the population to participate and the responses indicate that all elements of the

[55]Don A. Dillman, Mail and Internet Surveys, The Tailored Design Method, at 9 (Second Ed. 2000)("an example [of coverage error] would be the omission of people without telephones from a telephone survey").

population did in fact participate in the survey. Specifically, I received responses from every level of the federal judiciary, including the Supreme Court, and at least one response was received from every Circuit, and from 93 of the 94 Districts. The third source of potential error, measurement error, results from ambiguous questions that create imprecise responses that cannot be effectively measured.[56] In analyzing the survey responses, I was able to identify several questions that resulted in ambiguous responses. In an effort to reduce measurement error, I have excluded all of these questions and focused my attention on the questions that yielded clear and unambiguous responses. Finally, the fourth source of potential error, nonresponse error, occurs when "a significant number of people in the survey sample do not respond to the questionnaire and have different characteristics from those who do respond, when these characteristics are important to the study."[57] I incorporated several implementation strategies to attempt to reduce nonresponse error, including a personally addressed cover letter which explained the significance of the study, ensured complete confidentiality, offered my telephone number and email address for correspondence and thanked the recipient for their participation. I included a self addressed envelope and the questionnaire, which was relatively short and could be completed in approximately 5-10 minutes. Six weeks after the first mailing, I sent a follow up letter to anyone from whom I had not received any response (either a completed survey or communication indicating a lack of interest in completing the survey) and a new copy of the questionnaire. As a result of these efforts, the response rate ranged from 23% to 30% of the population. Specifically, the survey resulted in a 30% response rate from Supreme Court

[56]Dillman, Elements of the Tailored Design, at 9.

[57]Id. at 10.

Justices,[58] a 23.8% response rate from Circuit Court Judges and a 23.3% response rate from District Court Judges.[59] The similarity of response rates, particularly at the circuit and district court levels, suggests that participation at each of the three levels of the judiciary was comparable, thus providing no evidence of nonresponsiveness by a group of the population with different characteristics from the rest of the population. Moreover, the completed response pools of 60 Circuit Court Judges and 227 District Court Judges should correlate to the statistical significance that would result from completed sample sizes if 60 Circuit Judges were sampled from a population of 252 and 227 District Court Judges were sampled from a population of 973. Completed samples of this size would allow one to estimate the characteristics of the entire population to within 10 percentage points, plus or minus.[60]

The results of the survey are reported below.

What percentage of cases on your docket involve amicus curiae?

The response to this question substantiated the perception that amicus curiae are much

[58]Three Supreme Court Justices responded from a population of 10 to whom I sent the survey. Given the size of the population and response pool, it is difficult to draw statistically significant information to estimate the responses of that segment of the population that did not respond. In light of this limitation, I have tried to identify the individual responses of Supreme Court participants as evidence of the variety of viewpoints held rather than as an estimate of a viewpoint that is shared by the larger population.

[59]Sixty Circuit Court Judges responded from a population of 252 Circuit Judges and every circuit was represented by at least one respondent (First Circuit 3; Second Circuit 8; Third Circuit 12; Fourth Circuit 2; Fifth Circuit 5; Sixth Circuit 6; Seventh Circuit 2; Eighth Circuit 6; Ninth Circuit 12; Tenth Circuit 3; Eleventh Circuit 4; D.C. Circuit 2; Federal Circuit 1). Among the District Court Judges, 227 responded from a population of 973, and 93 of the 94 districts were represented by at least one respondent.

[60]Dillman, The Tailored Design Method, at 206-207.

more heavily involved in Supreme Court litigation than either Circuit or District Court litigation. Not surprisingly, all of the Supreme Court respondents indicated that more than 50% of their cases involve amicus curiae. In contrast, a significant majority of Circuit Court respondents (79%) indicated that 5% or less of their docket involve amicus curiae. [61] Only twelve Circuit Court Judges (21.1% of all respondents) indicated 15% or more of their cases involve amicus curiae.[62] At the district court level, amicus activity was even less significant, with the vast majority of district court judges (79.2%) responding that amicus activity was nominal or zero, and 19.9% indicating that approximately 5% of their docket involved amicus curiae.[63] Of the District Court respondents who indicated that approximately 5% of their docket involved amicus curiae briefs, identifiable clusters appeared in district courts in New York[64] and California.[65]

Interestingly, when judges perceive a need for additional information they will

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[61]Of the 60 Circuit Court respondents, 24.6% indicated that 0% of their docket involved amicus briefs, 54.4% indicated that approximately 5% of their docket involved amicus briefs, 19.3% indicated that 15% of their docket involved amicus briefs, and 1.8% indicated approximately 25% of their docket involved amicus briefs.

[62]The responses point to the D.C. Circuit Court of Appeals and the Ninth Circuit for more significant amicus activity. Specifically, all of the respondents from the District of Columbia Circuit who responded to the survey estimated that approximately 15% of their docket involved amicus curiae, while 25% of the Ninth Circuit Judges who responded estimated that 15% (or more) of their docket involved amicus curiae. The remaining respondents who indicated an increase in amicus activity were spread among the remaining circuits.

[63]Of the 227 District Court respondents, only .9% (2 respondents) indicated that more than 5% of their docket involved amicus curiae.

[64]Five of the 11 respondents from the Southern District of New York and both of the respondents from the Northern District of New York estimated that 5% of their docket involved amicus curiae.

[65]5 of the 10 respondents from districts in California estimated that 5% of their docket involved amicus curiae.

occasionally request amicus participation. Specifically, 54.2% of the Circuit Court respondents and 13.6% of the District Court respondents have requested amicus participation in a case, often reaching out to a governmental agency or entity to serve as amicus. In other instances, courts have issued open invitations for interested amicus curiae to file briefs on specific issues. For example, in United States v. Yida, the United States Court of Appeals for the Ninth Circuit issued an order "invit[ing] supplemental letter briefs by the parties and any amicus curiae" discussing two designated questions (and issuing blanket leave to file such amicus briefs.)[66]

In cases involving amicus curiae, are you influenced by the identity, prestige, or experience of the amicus curiae?

The response to this question indicates that federal judges are influenced by factors beyond the content of the brief submitted by the amicus curiae. All three of the Supreme Court Justices who responded to the survey indicated that these factors (particularly experience) are moderately influential in the decision making process. Similarly, a majority of the Circuit Court (55.3%)[67] and District Court (59.1%)[68] respondents indicated that identity/prestige/experience

[66]United States v. Yida, No. 06-10460. Such open invitations are also issued somewhat regularly by other courts. See Massachusetts Lawyers Weekly, March 5, 2007, at 11 (Massachusetts Supreme Judicial Court publishes notice soliciting amicus briefs in 4 separate cases).

[67]Of the 60 Circuit Court respondents, 17.9% indicated that identity, prestige, experience had no influence, 26.8% indicated that these factors had little influence, 33.9% indicated that these factors had moderate influence, and 21.4% indicated that these factors had significant influence.

[68]Of the 227 District Court respondents, 23.9% indicated that identity, prestige, or experience had no influence, 17% indicated that these factors had little influence, 41.5% indicated that these factors had moderate influence, and 17.6% indicated that these factors had significant influence.

are moderately or significantly influential**.**

In a telephone interview with Justice Ruth Bader Ginsburg we discussed why these factors may hold influence. In her opinion, the experience of the attorney (particularly experience before the Supreme Court) would be a likely barometer of the quality of the arguments set forth in the brief. She went on to say that her clerks often divide the amicus briefs into three piles: those that should be skipped entirely; those that should be skimmed; those that should be read in full. If the attorney submitting the amicus brief has significant experience before the Court, it would be more likely that their brief would be placed in a higher priority pile.

In cases involving amicus curiae, are you influenced by the number of amicus curiae (including co-signors) or the number of amicus briefs filed?

The Supreme Court respondents unanimously indicated that the number of amicus briefs filed tends to have zero influence on their considerations of the case. One Supreme Court Justice responded that the number of amicus curiae (including co signors) might have a little influence, while the two other Supreme Court respondents thought that the number of amicus curiae would provide no influence.[69] Circuit and District Court respondents similarly indicated that these factors were not tremendously influential. Specifically, 82.2% of Circuit Court respondents indicated that the number of amicus curiae provided little or no influence and 83.3% indicated that the number of amicus briefs provided little or no influence in the outcome of the dispute.[70]

[69]One Supreme Court Justice also noted that the number of amicus curiae is generally of little no consequence, "unless it is from many of the states."

[70]Of this number, 42.9% indicated that the number of amicus curiae held zero influence and 46.3% indicated that the number of briefs held zero influence. Only 17.9% of Circuit Court respondents indicated that the number of amicus curiae were "moderately" influential, and 16.7% indicated that the number of briefs filed was "moderately influential."

Similarly, 79.2% of District Court respondents indicated that the number of amicus curiae provided little or no influence and 77.7% indicating that the number of briefs provided little or no influence in the outcome of the dispute.[71]

The obvious concern with "me too" briefs is efficiency – such briefs inundate the courts with volumes of paper and offer little added value. It is not surprising therefore, that judges do not want to encourage such duplicity. What is surprising is that the respondents similarly did not seek to encourage co signors on amicus briefs. One would expect that if judges were interested in learning about the number of affected groups, they could gather some of this information by considering who has agreed to sign onto a brief. At all three levels of the federal judiciary, the respondents considered the number of amicus curiae and the number of briefs filed close to equal in terms of influence (or rather non influence).

Must we conclude that the affected groups theory is irrelevant? Not necessarily. One Supreme Court Justice who responded that the number of briefs was not influential and the number of amicus curiae was only marginally influential, did comment that "groups that are affected often help" to provide information relevant to the decision making process. Thus, while courts do not seek to turn the judicial process into a voting process where the judges merely count the number of groups which hold a certain opinion or perspective, they do appear to be

[71]Of this number, 48.7% indicated that the number of amicus curiae held zero influence and 51.6% indicated that the number of briefs held zero influence. Only 18.8% of District Court respondents indicated that the number of amicus curiae were "moderately" influential, and 19.6% indicated that the number of briefs filed was "moderately influential."

willing to consider the substantive information offered by affected groups.

D. Do you believe amicus curiae may be helpful in any of the following functions?

... To offer legal arguments that are absent from the parties' briefs.

The responses indicate that judges at all three levels of the federal bench find amicus curiae helpful in offering new legal arguments that are absent from the parties' briefs. All of the Supreme Court respondents indicated that this was a helpful function, as did both the Circuit[72] and District Court[73] respondents (78.9% and 82.5%, respectively, felt that this function was moderately or very helpful). The overwhelming response to this question is consistent with the education function described by the information theory.

It is not uncommon for amicus curiae to suggest alternative or supplemental support for a legal conclusion that might be too risky for a litigant to embrace.[74] For example, in Mapp v.

[72]Of the 60 Circuit Court respondents, 3.5% responded that it is a hindrance when amicus offer new legal arguments, 17.5% responded that new legal arguments are not a help or a hindrance in the process, 42.1% responded that new legal arguments are moderately helpful, and 35% responded that new legal arguments are very helpful.

[73]Of the 227 District Court respondents, 4.4% responded that it is a hindrance when amicus offer new legal arguments, 13.1% responded that new legal arguments are not a help or a hindrance in the process, 54.1% responded that new legal arguments are moderately helpful, and 28.4% responded that new legal arguments are very helpful.

[74]Madeleine Schachter, 28 Fordham Int'l L. J. 88 at 100-103 (2004). See also Samuel Krislov, The Amicus Curiae Brief: From Friendship to Advocacy, 72 Yale L. J. 694, 713 1962-63)("Where there is relatively adequate representation of the basic points of view, the amicus curiae ... may perform a valuable subsidiary role by introducing subtle variations of the basic argument, or emotive and even questionable arguments that might result in a successful verdict but are too risky to be embraced by the principal litigant. The strategy here is the reverse of that utilized by Brandeis– instead of identifying new techniques with a litigant's official position, it may very well be advantageous to label the new as unofficial so that if it should be rejected, a minimum of disapprobation attaches to the official cause.")

Ohio[75] the Supreme Court reviewed a woman's conviction for knowing possession of lewd and lascivious material in violation of the Ohio penal code. The appellant challenged the constitutionality of the Ohio statute but chose not to argue for the reversal of Supreme Court precedent (which held that the Fourteenth Amendment would not prohibit the admission of evidence obtained through an unreasonable search and seizure in state court for violation of a state crime.)[76] Commenting on the fact that the appellant chose not to present this argument, the Court noted that "appellant chose to urge what may have appeared to be the surer ground for favorable disposition and did not insist that [Wolf v. Colorado] be overruled." Notwithstanding this strategic choice, the ACLU, appearing as amicus curiae, supplemented the arguments made by the parties and expressly urged the Court to overrule Wolf. Ultimately, a majority of the Court agreed with the argument presented by the ACLU and the Court overruled the precedent set in Wolf to hold that "all evidence obtained by searches and seizures in violation of the constitution is, by that same authority, inadmissible in a state court."[77]

Notwithstanding the fact that courts frequently consider new legal arguments presented in amicus briefs, courts may impose limits on this role when it appears that the amicus curiae seeks to hijack control of the litigation. Thus, while amici are allowed to set forth new arguments and perspectives that help resolve the issues raised by the parties -- indeed amici are criticized if they merely duplicate the information presented by the parties -- they may not stray

[75] Mapp v. Ohio, 367 US 643 (1961)

[76]Wolf v. Colorado, 338 U.S. 25,33 (1949).

[77]367 U.S. at 655.

too far from the agenda as set by the parties.[78] The Supreme Court, for example, has refused to consider arguments presented by amici when "the party to the case [] has in effect renounced them"[79] and the D.C. Circuit has cited the "rule of avoidance" in refusing to consider a new constitutional question raised by amici.[80]

Do you believe amicus curiae may be helpful in any of the following functions? ...to focus the court's attention on matters that extend beyond the parties' dispute but impact a direct interest held by the amicus which may be materially impacted by the outcome of the case in which the amicus seeks to participate.

[78]Resident Council of Allen Parkway Vill v. HUD, 980 F2d 1043, 1049 (5th Cir. 1993); Eldred v. Ashcroft, 255 F.3d at 852 (dissenting opinion).

[79]New Jersey v. New York, 523 U.S. 761, 781 n. 3 (1998). See also, Amax Land Co. v. Quarterman, 181 F.3d 1356, 1367 (D.C. Cir. 1999)(following parties request for a remand instead of amicus' request that D.C. Cir. resolve the issue); Eldred v. Ashcroft, 255 F.3d 849, 851 (2001)(court deems it "particularly inappropriate in this case to reach the merits of the amicus's position.")

[80]Eldred v. Ashcroft, 255 f.3d 849 (D.C. Cir. 2001).

There was broad support for amicus curiae who focus the court's attention on matters that impact a direct interest that is likely to be materially impacted by the case. Specifically, all of the Supreme Court respondents indicated that this information would be moderately to very helpful, while 73.7% of the Circuit Court respondents[81] and 71.2% of the District Court respondents[82] indicated that the information offered by affected groups would be moderately or very helpful.

Do you believe amicus curiae may be helpful in any of the following functions? ...to focus the court's attention on matters that extend beyond the parties' dispute but impact an ideological interest held by the amicus curiae.

[81]Of the 60 Circuit Court respondents, 7% responded that it is a hindrance when amicus comment on matters that extend beyond the parties' dispute but impact a direct interest of the amicus, 19.3% responded that this information is not helpful or harmful, 43.9% responded that such information is moderately helpful, and 29.8% responded that such information is very helpful.

[82]Of the 227 District Court respondents, 8.2% responded that it is a hindrance when amicus comment on matters that extend beyond the parties' dispute but impact a direct interest of the amicus, 19.1% responded that this information is not helpful or harmful, 47% responded that such information is moderately helpful, and 25.7% responded that such information is very helpful.

In contrast to the response to the previous question, there was much less support for amicus who focused the court's attention on their own ideological interests. In fact, one Supreme Court Justice felt that such ideological information was a hindrance to the process. At the Circuit Court level, 69.1% of the respondents felt that information concerning an ideological interest held by the amicus would offer no help in the decision making process.[83] At the District Court level, 67.4% indicated that the ideological interests of the amicus would offer no help.[84] The responses to this question and the previous question dovetail with the affected groups theory in that federal judges are interested in learning about the potential impact of their decisions, but they seek to hear this from an affected group whose direct interests may be materially impacted rather than from groups or individuals with an ideological interest that they wish to share.

Do you believe amicus curiae may be helpful in any of the following functions? ...to facilitate a party who is not adequately represented.

Amicus curiae may serve a valuable role when a party is inadequately represented. A majority of the Circuit Court respondents (78.6%)[85] and the District Court respondents (71.2%)[86]

[83]Of the 60 Circuit Court respondents, 38.2% responded that it is a hindrance when amicus comment on an ideological interest of the amicus, 30.9% responded that this information is not helpful or harmful, 23.6% responded that such information is moderately helpful, and only 7.3% responded that such information is very helpful.

[84]Of the 227 Circuit Court respondents, 30.3% responded that it is a hindrance when amicus comment on an ideological interest of the amicus, 37.1% responded that this information is not helpful or harmful, 24.2% responded that such information is moderately helpful, and only 8.4% responded that such information is very helpful.

[85]Of the 60 Circuit Court respondents, 42.9% responded that amicus curiae are very helpful and 35.7% responded that amicus curiae are moderately helpful when a party is inadequately represented. Only 5.4% responded that such help is a hindrance and 16.1% responded that amicus curiae are not a help or a hindrance when a party is inadequately represented.

[86]Of the 227 District Court respondents, 20.6% responded that amicus curiae are very

indicated that amicus curiae are helpful in facilitating a party who is not adequately represented. The response was less overwhelming by the Supreme Court respondents, which could possibly be more of an indication of the quality of representation before the Court than the utility of amicus curiae for this purpose.[87]

> **Do you believe amicus curiae may be helpful in any of the following functions? ...to participate as litigating amicus by conducting discovery, or participating in trial stages of litigation.**

Not surprisingly, the respondents at all levels of the federal judiciary do not see tremendous utility in litigating amici. Specifically, 90.9% of Circuit Court respondents[88] and 89% of District Court respondents[89] indicated that litigating amici are a hindrance or a neutral consideration in litigation and two Supreme Court respondents indicated that litigating amici would be a hindrance.

> **Do you believe amicus curiae may be helpful in any of the following functions? ...to emphasize factual information and/or legal arguments that are present in the record and/or parties briefs**

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helpful and 50.6% responded that amicus curiae are moderately helpful when a party is inadequately represented. Only 9.4% responded that such help is a hindrance and 19.4% responded that amicus curiae are not a help or a hindrance when a party is inadequately represented.

[87]One Justice indicated that facilitating a party who is inadequately represented is a very helpful function of amicus curiae, while another Justice indicated that amici who perform this role are a hindrance to the decision making process.

[88]Of the 60 Circuit Court respondents, 36.4% responded that litigating amicus are a hindrance to the decision making process, and 54.5% responded that they offer no help in the process. Only 2.3% responded that litigating amicus are very helpful and 6.8% responded that they are moderately helpful.

[89]Of the 227 District Court respondents, 59.5% responded that litigating amicus are a hindrance to the decision making process, and 29.5% responded that they offer no help in the process. Only 1.7% responded that litigating amicus are very helpful and 9.2% responded that they are moderately helpful.

The respondent judges did not agree on the utility of amicus briefs that emphasize arguments that have already been presented by the parties. Specifically, of the two Supreme Court Justices who responded to this question, both thought that briefs which merely duplicated arguments already before the Court offered no help in the decision making process. Similarly, a slight majority of the District Court respondents (53.3%) indicated that emphasis on the parties' arguments offered no help.[90] Of the Circuit Court respondents, however, a slight majority (58.2%) indicated that such information can be moderately to very helpful.[91]

Do you believe amicus curiae may be helpful in any of the following functions? ...to offer relevant factual information that is absent from the record and/or parties' briefs

The response to this question raised very interesting results. The Supreme Court respondents unanimously indicated a favorable response to amicus curiae who offer factual information that is absent from the record (two of the three respondents indicated that such information is "very helpful"). Contrary to the strong response from the Supreme Court respondents, the Circuit Court and District Court respondents were lukewarm on the usefulness of new factual information presented by amicus curiae. In fact, a majority of the Circuit Court and District Court respondents (66.7% and 52.6%, respectively) believed that offering new

[90]Of the 227 District Court respondents, 12.2% indicated that merely emphasizing the parties' arguments is a hindrance, 41.1% indicated that this role was neither a help or a hindrance, 37.8% indicated that this role is moderately helpful and 8.9% indicated that this role is very helpful.

[91]Of the 60 Circuit Court respondents, 10.9% indicated that merely emphasizing the parties' arguments is a hindrance, 30.9% indicated that this role was neither a help or a hindrance, 49.1% indicated that this role is moderately helpful and 9.1% indicated that this role is very helpful.

factual information was a hindrance or a neutral factor in the process.[92] Only 33.3% of the Circuit Court respondents and 47.4% of the District Court respondents[93] indicated any helpfulness offered by new factual information.[94]

Several survey respondents included written comments to elaborate on the usefulness of extra record factual information. Some respondents indicated that only facts that have been admitted into the record in accordance with the Rules of Evidence should be considered, and all other factual information should be excluded from judicial consideration. Other respondents noted that legislative facts[95] or material of which one can properly take judicial notice[96] would

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[92]Notably, 24.6% of the Circuit Court respondents and 25.7% of the District Court respondents felt that amici who presented new factual information were a hindrance to the process.

[93]Of the 227 District Court respondents, 25.7% indicated that it is a hindrance when amici offer new factual information, and 26.9% indicated that such information offers no help in the decision making process. Only 11.4% indicated new factual information is very helpful and 36% indicated that such information is moderately helpful.

[94]Of the 60 Circuit Court respondents, 24.6% indicated that it is a hindrance when amici offer new factual information, and 42.1 indicated that such information offers no help in the decision making process. Only 14% indicated new factual information is very helpful and 19.3% indicated that such information is moderately helpful.

[95]Legislative facts are facts which inform the policy judgments of the court as opposed to adjudicative facts which are the facts relevant to the elements or claims to be proven in the case. Emerging Problems Under the Federal Rules of Evidence, American Bar Association Section of Litigation, at 29 (3rd ed. 1998).

[96]The Federal Rules of Evidence govern judicial notice of adjudicative facts, providing: "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and easy determination by resort to sources whose accuracy cannot reasonably be questioned." Rule 201(b). Notably, Rule 201(e) provides that "[a] party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken."

be appropriate extra record factual information for an amicus to present.[97] In a telephone conversation, Justice Ginsburg explained that the type of extra record factual information that she finds to be valuable might reflect upon the experience of the amicus curiae relative to the issue at hand. For example, she noted that in the Grutter decision, one of the most valuable briefs was submitted by former administrators of the military academies who suggested the negative impact that would result from a lack of diversity among military officers. She also mentioned as helpful amicus briefs submitted by business professionals who indicated the importance of diversity to the entities they served.[98]

E. How do you evaluate amicus participation by each of the following?

... Government (U.S. Solicitor General, state or federal attorneys, etc)

Amicus curiae briefs offered by governmental entities were favored at all levels of the federal bench. Specifically, all three Supreme Court respondents indicated that amicus briefs offered by governmental entities, particularly the U.S. Solicitor General, tend to be very helpful to the Court. Similarly, the Circuit and District Court respondents ranked the government as the most helpful amicus curiae, with 96.3% of Circuit Court and 86.4% of District Court respondents indicating that the government is either moderately or very helpful.[99]

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[97]Appellate courts are generally allowed to take judicial notice of facts that are not part of the record on appeal. Emerging Problems Under the Federal Rules of Evidence, at 32.

[98]In Grutter v. Bollinger, the Court noted that the University of Michigan's claim of a compelling interest was "bolstered by its amici, who pointed to the educational benefits that flow from student body diversity." 539 US at 330

[99]Of the 60 Circuit Court respondents, 50% indicated that the government is generally very helpful and 46.3% indicated that the government is moderately helpful when serving as amicus. Only 1.9% indicated that the government's participation as amicus is a hindrance and only 1.9% indicated that the government offers no help as an amicus.

Various explanations might be given to justify the high regard courts appear to hold for governmental amicus curiae. Governmental bodies provide institutional expertise that may prove helpful in determining the broader impacts of a particular judicial decision. To the extent that courts are involved in declaring social policy, the participation of other branches of government may help to legitimate the process by allowing, indeed on occasion requesting, input from the elected branches. Moreover, in light of the fact that courts are unable to enforce their judgments without the help of the other branches, participation as amici may facilitate the enforcement of judicial decisions down the road.[100]

How do you evaluate amicus participation by each of the following?
... Special Interest Groups (NAACP, ACLU, etc.)

Special interest groups are generally well regarded as amicus curiae, particularly if they are commenting on how their direct interests will be affected by a decision in the case.[101] Among the Supreme Court respondents, all three indicated that special interest groups tend to be moderately helpful, depending of course on the group and the extent of their interest in the issue. The Circuit Court and District Court respondents similarly ranked special interest groups as less helpful than governmental amicus, but still a significant source of information. Specifically,

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Of the 227 District Court respondents, 30.6% indicated that the government is generally very helpful and 55.8% indicated that the government is moderately helpful when serving as amicus. Only 1.4% indicated that the government's participation as amicus is a hindrance and only 12.2% indicated that the government offers no help as an amicus.

[100]Michael Lowman, 41 Am. U. L. Rev. 1243, 1262 (1992).

[101]One judge from the Southern District of New York noted that the ACLU is a frequent participant in litigation in this Circuit, "often in cases of limited congruence with its stated goals, or even apparently in contradiction to its litigating principles. It does not seem to meet with great success, perhaps for this reason."

56.6% of Circuit Court respondents[102] and 53.1% of District Court respondents[103] indicated that special interest groups tend to be “moderately helpful.”

How do you evaluate amicus participation by each of the following?
...law professors

[102]Of the 60 Circuit Court respondents, 1.9% indicated that special interest groups are a hindrance, 26.4% indicated that special interest groups are a neutral factor, and 15.1% indicated that special interest groups are very helpful.

[103]Of the 227 District Court respondents, 5.4% indicated that special interest groups are a hindrance, 25.9% indicated that special interest groups are a neutral factor, and 15.6% indicated that special interest groups are very helpful.

As experts in particular fields of law, professors are able to offer an informed legal analysis of a pressing legal question from a relatively neutral perspective. Thus, it is not surprising that all of the Supreme Court respondents indicated that law professors are moderately helpful to the process, as did 56.6% of Circuit Court respondents[104] and 52.8% of District Court respondents.[105]

Over the last decade there has been much discussion regarding the role of legal scholarship in judicial decision making. In 1992, Judge Harry T. Edwards published a provocative article in which he decried the growing disjuncture between legal education and legal practice, noting that:

> "many 'elite' law faculties in the United States now have significant contingents of 'impractical' scholars... The 'impractical' scholar ... produces abstract scholarship that has little relevance to concrete issues, or addresses concrete issues in a wholly theoretical manner. As a consequence, ... judges, administrators, legislators, and practitioners have little use for much of the scholarship that is now produced by members of the academy."[106]

To the extent that the atmosphere at some law schools is inhospitable for the scholar who

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[104]Of the 60 Circuit Court respondents, 7.5% indicated that law professors are a hindrance, 22.6% indicated that law professors are a neutral factor, and 13.2% indicated that law professors are very helpful.

[105]Of the 227 District Court respondents, 8.3% indicated that law professors are a hindrance, 22.9% indicated that law professors are a neutral factor, and 16% indicated that law professors are very helpful.

[106]Harry T. Edwards, The Growing Disjunction Between Legal Education and the Legal Profession, 91 Mich. L. Rev. 34, 35 (1992). Judge Edwards clearly supports a role for theory in the legal curriculum: "Over the past two decades, law and economics, law and literature, law and sociology, and various other "law and" movements have come to the fore in legal educatin. We also have seen a growth in critical legal studies (CLS), critical race studies, and feminist legal studies morements. In my view, all of these movements albeit measurably different in content and purpose, have potential to serve important educational functions and, therefore, should have a permanent home in the law schools. However, because many of the adherents of these movements have a low regard for the practice of law, their emergence in legal education has produced profound and untoward side effects." Id. at 34-35.

"wishes to provide helpful guidance on pressing social problems, and not to fight ivory-tower conflicts that are irrelevant to the outside world,"[107] the amicus brief may provide the vehicle through which law professors may help to shape the development of the law by providing thoughtful, practical, and theoretical insights that are relevant to real world disputes.

F. Do you believe that a financial relationship between a litigant and an amicus curiae is relevant to a court's decision to grant leave to file an amicus brief?

A majority of the respondents at all levels of the federal courts believe that a financial relationship between the amicus curiae and a litigant is a relevant factor to consider in evaluating the utility of the information offered by the amicus curiae. Specifically, two of the three Supreme Court respondents, 54.5% of the Circuit Court respondents and 74.6% of the District Court respondents indicated that a financial relationship would be relevant to consideration of a proposed brief.

G. Do you believe that there is a need for stricter procedural rules to limit the ability of non parties to participate in litigation as amicus curiae?

The overwhelming response to this question indicates that federal judges do not seek to close the doors on amicus participation by enacting stricter procedural rules. Specifically, all of the Supreme Court respondents, 87.7% of the Circuit Court respondents and 81.5% of the District Court respondents agreed that there is no need to clamp down on amicus activity. Interestingly, Justice Ginsburg noted that she did not think it necessary to impose stricter procedural rules to limit participation, but also indicated that it would be helpful if groups could coordinate their efforts and so that the judges could have access to the information but avoid the

[107] Id.

inefficiency of “me too” briefs. She noted that “a gem contained in one [brief] could be missed” by the shear volume of briefs that are presented to the Court.

IV. Amicus Curiae: A Prospective Evaluation

The historical and empirical evidence indicates that over the last 100 years, amicus curiae have played an increasingly significant role in federal litigation. They have inconspicuously morphed from neutral advisor to open advocate. They have enjoyed virtually unfettered access to the federal courts, first because their non party status has exempted them from even the basic case or controversy requirements of Article III and second because the federal courts have generously allowed their participation in all but a few instances. Moreover, the factual information offered by amici has largely avoided a critical eye because many of the procedural rules that protect the reliability of record evidence are inapplicable to information that is not admitted into evidence. These facts, combined with the incentive to become involved in litigation aimed at social reform, have given rise to a surge in amicus curiae activity in the federal courts, particularly at the Supreme Court. In this section of the paper, I will consider the implications of these developments and suggest some basic procedural reforms that may reduce some of the concerns that have been expressed about the increased participation of amicus curiae in federal litigation.

A. Do Amicus Curiae Undercut the Fundamental Values of Our Adversarial System?

In order to file a case in federal court, one must meet the requirements imposed by the case or controversy language of Article III, namely standing, ripeness and mootness. Professor Lea Brilmayer suggests that the case or controversy requirement, also commonly referred to as

the justiciability doctrine, serves three interrelated policies: (1) "the smooth allocation of power among courts over time;" (2) "the [avoidance of] unfairness of holding later litigants to an adverse judgment in which they may not have been properly represented;" and (3) "the importance of placing control over political processes in the hands of people most closely involved."[108]

The first of these policies recognizes that the essence of the justiciability doctrine is inextricably linked with stare decisis because the decisions of later courts are bound by the choices of the present court.[109] The effect of stare decisis is important in all litigation, but it is particularly important in public law litigation because it is precisely the future binding effect of a judicial decision that provides the force and incentive to induce individuals to conform their future conduct to the parameters of judicial determinations. Without stare decisis, courts would be limited to deciding single cases whose impact would be limited to specific litigants – a situation which would severely reduce, if not eliminate, the value of judicial determinations of social policy. Thus, the justiciability doctrine polices the allocation of power among courts over time to ensure that the first court to make a binding determination does so after a dispute has been brought forward by advocates with a real, cognizable, legal issue.

[108]Lea Brilmayer, 93 Harvard Law Review 297, 302 (1979).

[109]Id. at 304.

The second and third policies served by justiciability focus on the determination of who should be vested with authority to bring the issue and when the issue is ready to be determined. Specifically, the second policy recognizes that when an issue is determined by a court, other similarly situated individuals may be impacted by that determination. This result is inevitable, of course, in light of the impact brought to bear by stare decisis – to the extent that future litigants bring suits that are sufficiently similar to one that has been adjudicated, those litigants may be bound by the precedent set by the first determination of the issue. In light of this fact, the justiciability doctrine guarantees that a litigant have a personal stake in the outcome of the issue – as opposed to having a purely ideological interest in the issue – because such a person is believed to be the best representative of other potential litigants who share (or may in the future share) a personal stake in the issue.[110]

The third policy rests upon the notion of self determination: a person should not be able to assert the rights of others.[111] Specifically, an individual must have a personal stake in the issue before the court and must desire to participate as a party in the judicial process; it is not appropriate for a third party to seek the benefits of the judicial process on someone else's behalf.

The justiciability doctrine helps to ensure the fair administration of our judicial system

[110]Id. at 306-307 (Similar to class action litigation where a class representative must be a member of the class to be an effective representative of the class interest, the justiciability doctrine guarantees that a litigant has a personal stake in the outcome of the issue such that they will adequately represent others in a similar situation who are not before the court.) There is some disagreement over the notion that a personal stake is necessary for adequate representation. See Mark Tushnet, The Sociology of Article III: A Response to Professor Brilmayer, 93 Harv. Law Review 1698 (1979-80).

[111]Id at 310.

and the consistency of its decisions, allowing only those individuals or entities who meet standing, ripeness and mootness to avail themselves of the judicial process. Interestingly, it is precisely the protection afforded by the justiciability requirements that justifies the relatively free access provided to amicus curiae. While amicus curiae are permitted wide latitude in offering legal and factual insights to the courts, their role is purely supplemental to the central role played by the parties. Specifically, amicus curiae are not permitted to initiate a lawsuit or to participate in most of the strategic decisions in the litigation. Rather, the role of amicus curiae is limited to providing information to the court regarding issues that have been framed and presented by the parties. As long as the parties satisfy the requirements of Article III, the policies underlying justiciability will be guaranteed, regardless of whether amicus curiae offer supplemental information. [112] Indeed, once the judicial process has been initiated in accordance with Article III requirements, amicus curiae arguably further the policies of justiciability by adding to the quality of information upon which the court is able to make a determination. Thus, to the extent that a permissive policy toward amicus participation improves the quality of information upon which a court may declare the law, amicus curiae do not pose a serious threat to the adversarial structure of our judicial system.[113]

B. Should we be concerned about the quality of information presented by amicus curiae?

[112]Specifically, the supplemental information offered by amicus will not make the parties any less capable of representing their own interests or the interests of those individuals who are not at the table.

[113]Mark Tushnet, 93 Harv. Law Review 1698, 1698 (1979-1980)("When judges make law and scholars propose rules of law, they necessarily rely on their vision of society as it is and as it might be. If law is to be made well, those visions must be accurate and attractive.").

In light of the increasing significance of amicus curiae in federal litigation, it is imperative to evaluate the quality of information that is being offered and the procedural checks that exist to ensure a level of reliability. While Justice Breyer has lauded amicus briefs for performing an important role in educating judges,[114] such "education" is only relevant to the judicial function if it is based upon reliable information. Professors Rustad and Koenig similarly recognize the important role that amicus curiae can play in educating judges, but they emphasize that judges must be cognizant of the fact that not all information presented by amicus curiae will be equally reliable:

> [T]he alternative to admitting social science data is to return to nineteenth century legal formalism, according to which justices or other powerful groups substitute their own normative beliefs for scientific findings... Third-party amici providing social science data can be an important check against governmental abuse of power.... The problem of integrating social science research into constitutional decision-making is "complicated by the fact that not all social science is created equal"[115]

In light of the opportunity for amici to present exaggerated, skewed, or unreliable factual information, courts need a mechanism for distinguishing the reliable information from the unreliable information. Yet, because amicus briefs are not admitted into evidence, the information presented in the briefs tends to escape many of the procedural mechanisms that help to ensure reliability of record evidence. Expert testimony presents an excellent example of how

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[114]Stephen Breyer, The Interdependence of Science and Law, 82 Judicature 24, 26 (1998).

[115]Michael Rustad and Thomas Koenig, The Supreme Court and Junk Science: Selective Distortion in Amicus Briefs, 72 N.C. L. Rev. 91, 158-59 (1991)(Professors Rustad and Koenig have suggested that reliability concerns regarding information presented by amici could be mitigated through procedural mechanisms such as the judicial appointment of social science experts, the creation of special social science courts, or the creation of social science research agencies.) See also David Faigman, To Have and Have Not: Assessing the Value of Social Science to the Law as Science and Policy, 38 Emory Law J. 1005, 1081 (1989)("the legal

the rules of procedure and evidence work to shed light on the reliability of other sources of sophisticated data and information. Specifically, when a party anticipates using an expert to testify at trial, that expert must provide to the other litigants a report detailing, among other things, the expert's credentials, theories, and opinions.[116] Moreover, parties are given an opportunity to depose anyone who has been identified as an expert whose opinions may be presented at trial.[117] By allowing adversaries to become acquainted with expert theories and qualifications in advance of trial, the parties are better equipped to challenge the weaknesses of the expert's information and shed light on alternative conclusions that might be drawn.

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relevance of social science research simply cannot be divorced from its scientific credibility").

[116]Federal Rule of Civil Procedure 26 requires any expert who is retained or specially employed to provide expert testimony to disclose a report including: "a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years."

[117]Fed. R. Civ. P. (b)(4).

Moreover, at trial the rules of evidence require the court to engage in a rigorous review of the qualifications that justify calling the witness an expert, and the reliability of the theory upon which the expert seeks to opine.[118]

Factual information offered by amicus curiae, on the other hand, is not subject to a high level of judicial scrutiny (indeed, there are so few procedural checks in place, it is impossible to decipher a uniform process invoked by judges to review the content of amicus briefs). Of course, the ultimate check on the reliability of information presented through amicus curiae is the adversary system itself. Specifically, if an amicus curiae presents information that is inaccurate or unreliable, one of the parties is able to bring the deficiency to the court's attention. If amicus curiae believe that their adversary will effectively police the quality of the information that they present, the amicus will have an incentive to include the most reliable information. If on the other hand, the adversaries are not in a position to police the quality of information presented by amicus, then the incentive to present exaggerated or skewed information may become tempting.

If we assume that the adversary process is our primary means of scrutinizing the quality of information presented by amicus curiae, we must consider whether the litigants are given a fair opportunity to perform this function. Several issues raise potential for concern. First, to the extent that the parties have unequal resources it is likely that this function will not be adequately performed. The party with fewer resources will already be stretched to its limits responding to the demands of litigating against a Goliath, and it may be unrealistic to expect that party to

[118]Fed. R. Evid. 702-705.

adequately police and respond to specialized information offered by amicus curiae who are sometimes hand picked and solicited by their adversary. Second, in order to perform the policing function effectively, the parties must have access to the briefs in a timely fashion. Thus, the briefs must be available to the parties at an early enough stage in the litigation to allow the parties to digest the information, investigate its reliability, and if necessary, file a response or identify (and persuade) an amicus curiae to file a response.

C. A New Procedural Structure

While an overwhelming majority of survey respondents favor some role for amicus curiae in federal litigation, there is disagreement about the limits that should be placed on such participation and who should police those limits. The Seventh Circuit, for example, has been an outspoken critic of automatic acceptance of amicus briefs, stating that the decision of whether to allow an amicus filing is a matter of "judicial grace" and promising to deny permission to file a brief that fails to offer new legal arguments or factual information.[119] Interestingly, while the Seventh Circuit encourages amicus curiae to offer new legal arguments, the Court of Appeals for

[119]Voices for Choices v. Illinois Bell Telephone Co., 339 F.3d at 544("[t]he judges of this court will therefore not grant rote permission to file such a brief, and in particular they will deny permission to file an amicus brief that essentially duplicates a party's brief.... The reasons for the policy are several: judges have heavy caseloads and therefore need to minimize extraneous reading; amicus briefs, often solicited by parties, may be used to make an end run around court-imposed limitations on the length of parties' briefs; the time and other resources required for the preparation and study of, and response to, amicus briefs drive up the cost of litigation; and the filing of an amicus brief is often an attempt to inject interest group politics into the federal appeals process.") The Seventh Circuit has established a set of guidelines to gage the utility of amicus briefs, granting permission to file if: (1) the brief presents ideas, arguments, theories, insights, facts, or data that are not to be found in the parties' briefs; (2) the potential amicus has a direct interest in another case that may be materially affected by a decision in the pending case; or (3) the potential amicus has a unique perspective or specific information to assist the court. Id. at 545.

the District of Columbia has expressed concern over allowing amicus curiae unlimited power to offer new arguments.[120] In Eldred v. Ashcroft, the court relied upon the "rule of avoidance" in refusing to consider a new constitutional argument presented by amicus, noting that the argument implicated new legal issues that were not raised by the parties.[121] In contrast, the Third Circuit has kept the door wide open for amici, noting that a selective denial of amicus briefs may create an unwarranted appearance of view point discrimination.[122] While each of these courts has expressed a different concern regarding amicus briefs, their concerns focus on fundamentally important issues -- party autonomy, neutrality of decision maker, and efficiency.[123] The question that appears to create the disagreement, is not whether we should be concerned about these issues, but rather, how to protect the important values that are at stake.

Under the current system, governmental amicus curiae are permitted to file a brief without consent of the parties and without leave of court, while non governmental amicus curiae

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[120]Eldred v. Ashcroft, 255 f.3d 849 (D.C. Cir. 2001).

[121]Id. at 850-51. The dissenting opinion strongly disagreed with the decision to ignore the amicus' argument, noting that "the role of an amicus is to assist the court in addressing the issues already raised with new arguments and perspectives. ... [In this case], the amicus brief ... addressed [the] issue more persuasively than did appellants. But amicus did not 'expand' the scope of appeal by 'implicating issues' not raised by the appellant." Id. at 852. But see Teague v. Lane 489 US 288, 300, 330 (1989)(stating court was free to address issue raised only in amicus brief).

[122]Neonatology Assoc. v. Commissioner of Internal Revenue, 293 F.3d 128, 132 (3d. Cir. 2002)(questioning whether the court is able to appropriately weigh the value of the briefs at an early stage in the litigation).

[123]Specifically, the Seventh Circuit has expressed concern about efficiency and sought to avoid needless duplicity, the D.C. Circuit has sought to protect party autonomy by prohibiting amici from injecting new legal issues into the litigation and the Third Circuit has raised concerns about the appearance of bias that may arise from selective rejection of briefs.

may file a brief if: (1) the parties consent to the filing; or (2) the court grants leave to file.[124] Pursuant to this rule, courts have tended to grant leave to virtually all amicus briefs submitted, avoiding a premature judgment on the content of the briefs, but leaving the door open for duplicitous briefs that undercut efficiency.[125] This open door policy makes sense when one considers that in order to police the briefs for duplicitous content, the courts would have to read them all – thus imposing the very burden that the court seeks to avoid. One way to resolve this quandary, is to rely more heavily upon the adversary process to police the content of amicus briefs and preserve the court's role for limited instances where the parties are unable to resolve their differences.

Traditionally, amicus curiae were neutral players who submitted information to assist the court -- so called "friends of the court." The value of an amicus brief was derived from the fact that the information offered was provided from a neutral perspective, not in support of one side or the other. Today, however, amicus curiae are not neutral players in the litigation. It is accepted practice for amicus curiae to support a party, indeed the rules require the cover of the amicus brief to identify the party or parties supported by the brief.[126] Moreover, litigants are quite strategic about the process of soliciting and managing amicus participation.[127] For

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[124]Sup. Ct. Rule 37(2) and (3); Fed. R. App. P. 29(a).

[125]The secondary effect of an open door policy is that litigants are unlikely to refuse consent when they know that the court is very likely to grant permission to file.

[126]Sup Ct. Rule 37(2); Fed. R. App. P. 29(b).

[127]See 55 Case Western Reserve 667, 674 (2005)("Parties often solicit amicus support as another weapon in the adversarial struggle."); see also, Glassroth v. Moore, 347 F.3d 916, 919 (commenting upon the amount of time counsel spent seeking amici support); Voices for Choices, 339 F.3d 542, 544 (7th Cir. 2003).

example, a recent article in the Legal Times described a fee dispute in a high profile case before the Supreme Court. The dispute resulted in papers being filed that "shed a rare behind-the-scenes light on how war is waged in high-stakes Supreme Court Court litigation." These documents indicated that Kenneth Starr devoted 58 hours, at $750 an hour, attempting to "secure an amicus curiae brief from then-acting Solicitor General Paul Clement, or at least to keep him from supporting [the other side]" in the dispute.[128] To the extent that litigants often orchestrate amicus activity, the rules of procedure should recognize this reality and place the formal responsibility for coordinating amici squarely on the parties' shoulders.

Unlike the court, parties are often aware of the arguments that supportive amicus curiae will present, either because they have solicited their participation or because the amicus has reached out and contacted the party regarding the litigation. Thus, the parties are in a better position than the court to shoulder the responsibility of ensuring that the information presented educates the court on a relevant issue that has not already been brought to the court's attention. Similar to the discovery rules which encourage the early exchange of factual information among litigants, the rules should require every party to provide to every other party information regarding amicus activity. Specifically, every entity desiring to participate as amicus curiae should be required to prepare and sign a written report similar to the expert report required by Fed. R. Civ. P. 26(a)(2)(B). This report would describe the amicus' interest in the litigation, identify the party supported, outline the information/legal arguments to be presented, and provide information relating to the amicus' credibility (ie. scholarly articles written by the amicus, other litigation involving the same issue(s) in which the amicus has participated as a

[128]Grapes of Wrath at the High Court, Tony Mauro, Legal Times (April 14, 2006).

party or amicus, compensation by a party for amicus participation, facts relating to any relationship that exists between the amicus and the party supported, etc.). Such reports should be prepared by the amicus, provided to the litigant supported by the amicus, and then given by the litigant to all other parties to the suit and filed with the court. These reports should be provided at a relatively early stage in the litigation, thus providing a better opportunity for parties to evaluate the quality of information presented by amici and increase the chances that the adversary process will successfully identify inaccurate, skewed, or irrelevant information.[129]

The amicus reports would not significantly change the procedure for rebutting information offered by amicus curiae, but rather would empower the adversaries to more efficiently police the amicus process. The early exchange of amicus reports will facilitate all parties, but the reports will provide significant support to parties with limited resources. Rather than allowing an adversary to swamp an opposing party (particularly tempting when one party has fewer resources), the amicus report(s) will provide timely notice of the quantity of briefs that

[129]The most recent amendments to the Supreme Court Rules are consistent with the procedural structure suggested herein but do not go far enough. Specifically, on June 25, 2007, the Supreme Court adopted amendments to Rule 37 which require amicus curiae to serve a notice of intent to file a brief prior to actually filing the brief, impose earlier deadlines for filing amicus briefs which seek to allow a responding party more time to respond to the amicus curiae, and require notification if a party or counsel to a party "is a member of the amicus curiae, or made a monetary contribution to the preparation or submission of the brief." Rules of the Supreme Court of the United States, Rule 37.2(a), 37.6 (amended June 25, 2007).

can be expected, outline the arguments to be presented and provide adversaries with relevant background information concerning the identity and credibility of the amicus curiae. The reports provide a natural disincentive to "me too" briefs because redundancy of the briefs will be readily identifiable from the argument outlines. Moreover, early notice of the arguments to be presented will facilitate the identification of skewed or unreliable information and provide a more even playing field to respond. Overall, the exchange of amicus reports will allow parties to communicate and negotiate regarding amicus curiae, thus making the adversaries the primary gatekeepers for amicus activity. If the parties are unable to resolve their differences, parties may withhold consent to file the brief and inform the court of the perceived defects in the proposed filing. If the amicus is permitted to file notwithstanding a party's objection, the party may then rebut the assertions of the amicus in its own brief or solicit an amicus to offer rebuttal insights. The procedure set forth in this paper provides the parties with more information to make these decisions and shifts the primary burden of policing the amicus process onto the adversaries.

V. Conclusion:

The analysis presented in this paper suggests that amicus curiae often play an important role in federal litigation. Yet, the current attitude allowing virtually unchecked access to file amicus briefs, creates a very real threat to the efficient adjudication of cases. "Me too" briefs which merely repeat arguments that have already been fully vetted and briefs containing skewed or unreliable information offer no significant utility to the court, while briefs that educate the court on complex technical matters or inform the court of potential impacts of a decision on non parties offer valuable insights to the decision making process. This article suggests that the current procedural regime places too heavy a burden on the courts to ferret out the wheat from

the chaff, thus leading many courts to freely admit virtually every amicus brief that is offered. In light of the practical reality that litigants often solicit, coordinate, manage and orchestrate supporting amicus briefs, this article suggests that the procedural system should openly acknowledge this activity and place more responsibility for policing the content of amicus briefs on the parties. Specifically, the rules of procedure should require early exchange of information regarding each litigant's intended amicus activity. This information would extend beyond merely identifying the amicus curiae, to include background information regarding the amicus and its interest in the litigation (such information might resemble the information required in an expert report under F.R.C.P 26) as well as an outline of the arguments and/or information that will be contained in the brief. An early exchange of this information would allow the litigants to identify attempts to inundate the court with "me to" briefs, thus allowing them to pressure their adversary to avoid such duplicity. It would also allow litigants more time to evaluate the reliability of adverse amicus briefs and prepare an appropriate response.