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Amicus Curiae: Friend Or Foe: The Limits of Friendship in American Jurisprudence

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AMICUS CURIAE: FRIEND OR FOE? THE LIMITS OF FRIENDSHIP IN AMERICAN JURISPRUDENCE

"An attorney of our acquaintance once told the court, when asked for his response to the argument of the amicus, 'That fellow isn't any more a friend of the court than I am.'"[1]

I. INTRODUCTION

You have a client named Tom. He sells widgets. Then, there is Jerry. He sells an equally imaginative product. Jerry, however, is involved in a lawsuit concerning his product, the repercussions of which will affect Tom's interests. Your client lacks standing to bring an action as a named party, because he fails to meet the requirements set forth in Article III of the United States Constitution and in the Federal Rules.[2] What do you do?

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[1] Strasser v. Doorley, 432 F.2d 567, 569 n.2 (1st Cir. 1970).

[2] *See* U.S. CONST. ART. III, § 2, cl. 1 (requiring that cases "aris[e] under this Constitution"); FED. R. CIV. P. 19 (allowing joinder if needed for just adjudication); FED. R. CIV. P. 23 (allowing members of class to sue or be sued if several prerequisites are met); FED. R. CIV. P. 24 (allowing for intervention of right and permissive intervention in certain circumstances). Article III of the United States Constitution provides, in pertinent part: "The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States . . .." U.S. CONST. ART. III, § 2, cl. 1. The Court in *Valley Forge Christian College v. American United for Separation of Church and State, Inc.*, read Article III as requiring parties to "show that [they] personally [have] suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." 454 U.S. 464, 472 (1982) (quoting Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979)). *See also* Sierra Club v. Morton, 405 U.S. 727, 731-32 (1972) (interpreting Article III as prohibiting advisory opinions and requiring parties to have concrete stake in outcome of controversy). The Federal Rules impose further standing requirements on potential litigants in the form of intervention of right and permissive intervention. Fed. R. Civ. P. 24. Rule 24 provides that intervention as of right shall be permitted when a statute allows intervention or when the applicant is not adequately represented by the existing parties and disposition of the case will impair or impede the applicant's ability to protect their interest in the subject of the action. *Id.* Permissive intervention may be permitted when a statute allows intervention or when applicant's claim or defense shares a question of law or fact with the main action. *Id.*

One possibility is to serve as amicus curiae and file an amicus brief with the court.[3] Amicus briefs allow third parties to intervene without satisfying the prerequisites of Article III or the Federal Rules. Although amici curiae are versatile and permeate nearly every facet of our legal system, their efficacy is limited.[4] As an illustration of these limits, assume arguendo that Congress substituted a true democracy for our republican form of government. Although a popular vote would incorporate a greater variety of perspectives than a representative form of government, the efficiency and practicability of a popular vote in everyday legislation would be limited. Coordinating national balloting for each of the many issues that arise each day would be overwrought with confusion and burdened by complexity. The amicus curiae device may be likened to a democracy: It would afford the court additional perspectives,[5] but its application to everyday litigation would be impracticable,

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[3] *Cf.* United States v. State of Michigan, 116 F.R.D. 655, 664 (W.D. Mich. 1987) (granting litigating amicus status to private amicus); Northside Indep. Sch. Dist. of Bexar v. Texas Educ. Agency 410 F. Supp. 360, 362-63 (W.D. Tex. 1975) (authorizing amicus curiae to conduct discovery as parties to litigation); United States v. Texas, 356 F. Supp. 469, 473 (E.D. Tex. 1972) (authorizing amicus curiae to enforce district court's judgment); United States v. Dougherty, 473 F.2d 1113, 1125 n.18 (D.C. Cir. 1972) (authorizing amicus curiae to present and question witnesses).

[4] *See* Karen O'Connor & Lee Epstein, *Amicus Curiae Participation in U.S. Supreme Court Litigation: An Appraisal of Hakman's "Folklore,"* 16, 2 L. & SOC'Y REV. 311, 317 (1981-82) (indicating pervasiveness of amicus curiae in American court system). By 1980, amicus briefs were being filed in more than half of all noncommercial, full opinion cases, including a diverse and comprehensive assortment of both civil and criminal cases. *Id.* at 317. There were four or more amicus briefs filed in over one quarter of these cases. *Id.* Some have characterized this trend toward increased amicus filings as the rule rather than the exception. *Id.* at 318. *See also* Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L.J. 694, 695 (1963) (discussing pervasive, evolution of amicus briefs and their limitations); *Cf.* Webster v. Reproductive Health Servs., 492 U.S. 490, 495 (1989) (representing pervasiveness of amicus briefs by accepting seventy-eight briefs, which were filed with this case). The courts' failure to prescribe a precise definition for amici curiae has increased the versatility of the device. *See infra* notes 13-31 and accompanying text (discussing metamorphosis of amicus curiae doctrine).

[5] *See generally* Ryan v. Commodity Futures Trading Comm'n, 125 F.3d 1062, 1063 (7th Cir. 1997) (opining limits, such as, amicus status only for parties offering different perspectives than named parties); United States v. Michigan, 940 F.2d 143, 164 (6th Cir. 1991) (stating amicus curiae's purpose as providing impartial information on matters of public interest); Miller-Wohl, Inc. v. Commissioner of Labor & Indus., Mont., 694 F.2d 203, 204 (9th Cir. 1982) (describing amicus curiae's role as directing court on matters of public interest to law); New England Patriots Football Club, Inc. v. University of Colo., 592 F.2d 1196, 1198 n.3 (1st Cir. 1979) (observing amicus focus on legal questions before court not partisan questions of fact); 4 Am. Jur. 2d *Amicus Curiae* § 1 (1995) (describing traditional amicus curiae as neutrally providing information to court).

resulting in confusion and delay.[6] Our forefathers found the necessary limits for a working democracy in the form of a republic. We must now do the same for amici curiae. These limits are the focus of this note: namely, what are the proper limits for amici curiae in America today?[7]

This note begins by introducing a few of the strengths and weaknesses of the amicus curiae.[8] The discussion then traces the metamorphosis of the amicus curiae, from its modest beginnings in Rome to its Kafka-esque birth in America.[9] Specifically, the note reveals how, at the expense of Constitutional provisions and legislative regulations, the unfettered evolution of amicus curiae doctrine has afforded third parties rights typically enjoyed by named parties.[10] Remedial constructions, posited by modern courts under the rubric of governmental and litigating amici curiae, have been inadequate and misdirected.[11] This note will ultimately examine court reactions and propose alternatives better suited to the strengths and weaknesses of amicus curiae in America.[12] Ultimately, however, this note is like the amicus curiae, with the strength of analysis and the weakness of being limited to that analysis.

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[6] *See generally Webster*, 492 U.S. 490 (1989) (reviewing seventy-eight amicus briefs filed in case); United States v. Michigan, 940 F.2d 143, 166 (6th Cir. 1991) (observing that court-conferred litigating rights caused discord, confrontation, continuing acrimony, and confusion); David B. Smallman, *Amicus Practice*, 25 LITIG., No. 2 Winter 1999, 27 (citing average case load for active circuit court judge as 449 cases for 255 working days); John Howard, *Retaliation, Reinstatement, and Friends of the Court: Amicus Participation in Brock v. Roadway Express, Inc.*, 31 HOW. L.J. 241, 255 (1988) (opining that Supreme Court reviews more briefs from amici than from parties); Fowler V. Harper & Edwin D. Etherington, *Lobbyists Before the Court*, 101 U. PA. L. REV. 1172, 1172-73 (1953) (indicating connection between amicus curiae's increased filing and Supreme Court's enactment of limitations on them).

[7] *Cf.* Krislov, *supra* note 4, at 695-96 (stating that courts always avoided precise definitions of parameters and attendant circumstances of amicus curiae).

[8] *See supra* notes 1-12 and accompanying text.

[9] *See infra* notes 13-31 and accompanying text.

[10] *See infra* notes 32-85 and accompanying text.

[11] *See infra* notes 86-103 and accompanying text.

[12] *See infra* notes 103-23 and accompanying text.

II. METAMORPHOSIS: THE BIRTH AND REBIRTH OF THE AMICUS CURIAE

Amicus curiae literally denotes "friend of the court."[13] In the fourteenth century and under Roman law, serving as a friend to the court was also its doctrinal purpose.[14] In the past, courts would appoint attorneys to submit non-binding written opinions.[15] As neutral advisors, the amicus' job was both to educate the court on various aspects of the law and to help it avoid error.[16] The amici curiae's only responsibility was to remain loyal to the court and serve it exclusively.[17]

The English court expanded the doctrine of amicus curiae in 1736.[18] In *Coxe v. Phillips*,[19] the amicus helped the court avoid error by noting that the lawsuit before the court was collusive and intended only to attack the amicus' own marital status.[20] The amicus managed to serve

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[13] *See* Ryan v. Commodity Futures Trading Comm'n, 125 F.3d 1062, 1063 (7th Cir. 1997) (defining amicus curiae as "friend of the court, not friend of a party"); BLACKS LAW DICTIONARY 43 (5th ed. 1983) (providing general definition).

[14] *See* Michael K. Lowman, *The Litigating Amicus Curiae: When Does The Party Begin After the Friends Leave?*, 41 AM. U.L. REV. 1243, 1244 (1992) (noting that traditional role of amicus curiae was as impartial assistant to judiciary); Harper & Etherington, *supra* note 6, at 1176 (discussing amicus curiae's honored position in Roman times).

[15] *See* Comment, *The Amicus Curiae*, 55 NW. U.L. REV. 469, 469 n.3 (1960) [hereinafter, Comment, Amicus Curiae] (detailing role of amicus curiae as one of educator and friend of courts); *cf.* John Koch, Comment, *Making Room: New Directions in Third Party Intervention*, 48 U. TORONTO FAC. L. REV. 151, 157 n.26 (1989) (noting primary manner of performing duties as American amicus is by written brief); Eugene R. Fridell, *Befriending the Court: A Few Words of Amicus Briefs,* LEGAL TIMES, Sept. 5, 1983, at 8, 9 (highlighting oral argument for amici as exception to general rule of submitting written briefs); FED. R. APP. P. 29 (permitting amici to participate in oral argument in extraordinary circumstances).

[16] *See* Comment, Amicus Curiae, *supra* note 15, at 469 n.3 (discussing role of amicus curiae) .

[17] *See* Miller-Wohl Inc. v. Commissioner of Labor & Indus., Mont., 694 F.2d 203, 204 (9th Cir. 1982) (emphasizing that amicus is not party to litigation); Comment, Amicus Curiae, *supra* note 15, at 469 n.3 (discussing amicus curiae's purpose under Roman Law); Lowman, *supra* note 14, at 1244 (describing amicus as court assistant).

[18] *See generally* Ernest Angell, *The Amicus Curiae: American Development of English Institutions*, 16 INT'L COMP. L.Q. 1017, 1017 (1967) (tracing development of amicus curiae from Roman Law to present Anglo-American device).

[19] 95 Eng. Rep. 152 (K.B. 1736).

[20] *Id.*

as a friend of the court while simultaneously protecting his own interests, marking the demise of the fourteenth century exclusivity requirement.[21]

The adversarial nature of the American legal system is at variance with third party representation in litigation. [22] This variance has transformed the traditional concept of amicus curiae.[23] Modern amicus curiae doctrine has evolved with twentieth century litigation.[24] Modern litigation often involves complex subject matter, issues of public importance, and/or matters affecting third parties that are incapable of satisfying standing or intervention requirements.[25] Although this modern-day metamorphosis of amicus curiae tradition may be consistent with modern-day litigation, Constitutional requirements,[26] judicial precedents,[27] and legislative enactments[28] continue to exclude third parties from litigation.[29] The judiciary has reacted to this conflict by allowing government and private attorneys to serve as litigating amici curiae, thereby circum-

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[21] *See* Krislov, *supra* note 4, at 697 (noting dual interests being served and expanding role of amicus curiae).

[22] *See id.* at 696 (warning third party representation is "one of most serious and enduring shortcomings of adversary system").

[23] *See id.* at 699-702 (discussing introduction of amicus curiae into American system).

[24] *See* Lowman, *supra* note 14, at 1255 (citing Donald L. Horowitz, *The Courts and Social Policy*, 4 (1977)) (criticizing courts for limiting themselves to their traditional judicial roles instead of important social issues).

[25] *See id.* (providing general background of relationship of amicus curiae and courts).

[26] *See* U.S. CONST. ART. III, § 2, cl. 1 (requiring that cases "aris[e] under this Constitution"). *See also supra,* note 2 and accompanying text (discussing requirements to bring action as named party).

[27] *See* Gladstone Realtors v. Village of Bellwood, 441 U.S. 91,100 (1979) (noting concerns that plaintiffs assert their own distinct interests, rather than those of third parties); United States v. Michigan, 940 F.2d 143, 165-66 (6th Cir. 1991) (distinguishing amici from real parties in interest); Miller-Wohl, Inc. v. Commissioner of Labor & Indus., Mont., 694 F.2d 203, 204 (9th Cir. 1982) (stating reluctance to give party powers to nonparties and requiring granted petition to intervene).

[28] *See* FED. R. CIV. P. 24. (West 1999). Intervention as of right shall be permitted when a statute allows intervention or when the applicant is not adequately represented by the existing parties and disposition of the case will impair or impede an applicant's ability to protect their interest in the subject of the action. *Id.* Permissive intervention may be permitted when a statute allows intervention, or when applicant's claim or defense shares a question of law or fact with the main action. *Id.*

[29] *See* Lowman, *supra* note 14, at 1299 n.51 (citing Stephen L. Wasby, *The Supreme Court in the Federal Judicial System*, 110 (2d. ed. 1984)) (concluding limiting access to federal courts enhances adversarial process, which further limits third party representation).

venting the Constitutional and statutory restrictions, which previously restrained third party involvement.[30] Notwithstanding the judiciary's good intentions, the removal of restrictions on third party involvement has metamorphosed the amicus curiae doctrine into an adversarial weapon.[31]

III. "FRIENDSHIP IS FEIGNING"[32]

The amicus curiae doctrine made its first appearance in American jurisprudence in 1823.[33] In *Green v. Biddle*,[34] the State of Kentucky served as amicus and helped the Court avoid error by noting that the lawsuit before the Court was collusive.[35] Similar to *Coxe v. Phillips*,[36] the *Green* Court premised amicus status on helping the court avoid error while simultaneously using it to represent the State of Kentucky's own interests.[37] This representation of dual interests expanded the doctrine of amicus curiae in America, as it had in England, to include the interests of both the court and amicus.[38] Yet unlike the *Coxe* court, the Court in

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[30] *See* Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L.J. 1355, 1373-74 (1991) (proposing how litigating amici can circumvent many impediments and provide remedies); Krislov, *supra* note 2, at 699 (theorizing that amicus curiae made it easier for third-party representation).

[31] *See infra* notes 32-48 and accompanying text (illustrating judiciary's role in transforming amicus curiae from unbiased informant to advocate).

[32] *See* William Shakespeare, As You Like It act 2, sc. 7.

[33] *See* Green v. Biddle, 21 U.S. (8 Wheat) 1, 3 (1823) (recognizing novelty of amicus issue).

[34] 21 U.S. (8 Wheat) 1 (1823).

[35] *See id.* at 18.

[36] 95 Eng. Rep. 152

[37] *Compare Coxe*, 95 Eng. Rep. 152 (informing court that lawsuit was pursued only to attack amicus' marital status) *with Green*, 21 U.S. (8 Wheat) at 17-18 (informing court that state interests were unrepresented). In *Coxe*, the court's holding, which is predicated on error, expanded amicus doctrine to include serving the amicus' own interests. *Coxe*, 95 Eng. Rep. at 152. Similarly, in *Green*, the court's holding, which is also predicated on error, expanded the doctrine in America to include serving a governmental interest. *Green*, 21 U.S. (8 Wheat) at 17.

[38] *See Green*, 21 U.S. (8 Wheat) at 17-18 (broadening role of amicus curiae); Florida v. Georgia, 58 U.S. (17 How.) 621 (1854) (stating U.S. attorney's right to serve as amicus in matters affecting boundaries of states); The Amiable Isabella, 19 U.S. (6 Wheat.) 1 (1821) (representing U.S. government view on treaty). These holdings should not suggest that, in filing its amicus briefs, the U.S. represented solely its own interests.

Green provided for the interests of a governmental entity rather than a private third party.[39] This initially minor factual distinction would soon develop into a major doctrinal divergence in American jurisprudence.[40]

The next major evolution of the American amicus curiae occurred when courts began providing for the interests of private amici.[41] There are now two major categories of amici curiae: private and governmental amici.[42] Governmental amici are afforded all rights of a real party in interest; this is consonant with established legal doctrine.[43] In *United States v. Michigan*, however, the court also allowed private amici to advocate for a party position.[44] This created a second category of amici curiae in the form of private amici.[45] Private amici have fewer rights than named-parties because their existence is inconsistent with our legal system.[46] In terms of serving as a friend to the court, private amici are generally less objective than governmental amici: Government amici endeavor for the public interest while private parties often labor for themselves.[47] While the actions of government amici are consistent with

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Cf. Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 478 (1812) (representing views of foreign embassy on court's suggestion).

[39] *See Green*, 21 U.S. (8 Wheat) at 17-18 (granting state of Kentucky's request for rehearing on grounds that state interests were not represented).

[40] *See infra* notes 104-12 and accompanying text (addressing applicability of amicus curiae doctrine to government and private amici).

[41] *See* United States v. State of Michigan, 116 F.R.D.655, 665 (W.D. Mich. 1987) (granting full litigating amicus status to private amicus).

[42] *See* Comment, Amicus Curiae, *supra* note 15, at 480-81 (listing types of amici: governmental amici, public interest amici, and private special interest group amici). Actually, the categories can be accurately grouped into two groups: governmental amici and private amici. Krislov, *supra* note 4, at 609, 702; Lowman, *supra* note 14, at 1267.

[43] *See* Comment, Amicus Curiae, *supra* note 15, at 480 (affording governmental amici latitude because representing public welfare allows for accurate prediction of contemplated regulation).

[44] *See State of Michigan*, 116 F.R.D. at 664 (granting full litigating amicus status to private amicus).

[45] *See id.* (granting Knop class all rights of named party).

[46] *See* U.S. v. Michigan, 940 F.2d 143, 165-66 (6th Cir. 1991) (stressing distinction between amicus curiae and named parties). The court in *Michigan* held that the amici lacked standing to be a real party in interest. *Id.* at 165. Moreover, standing may only be acquired pursuant to the Federal Rules. *Id.* These rules may not be evaded by judicial legerdemain. *Id.*

[47] *See generally Michigan*, 940 F.2d at 166 (observing that amici subverted rights of original parties and exacerbated proceedings).

named parties, private amici may represent competing interests.[48] The disparity between the limited rights afforded to private amici and the expansive rights afforded to government amici has served as the proverbial battleground for amici curiae in America.[49]

A. Government Amici

The granting of near-party status to government amici is proper because it serves the court's end, is consistent with established legal principles, and has limiting provisions.[50] Like their fourteenth century Roman predecessors, government amici educate the court and help it to avoid error.[51] Additionally, the government has the unparalleled ability

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[48] *See* Lowman, *supra* note 14 at 1267 (observing transformation of public interest groups from providing information to active involvement in litigation).

[49] *See id.* (attributing private litigating amici status to court's failure to distinguish between private and government amici).

[50] *See generally id.* at 1261-64 (discussing "[g]overnmental bodies acting as amicus curiae").

[51] *See* Faubus v. United States, 254 F.2d 797, 805 (8th Cir. 1958) (stating custom of district courts to ask executive branch for aid and advice); City of Grand Rapids v. Consumers' Power Co., 185 N.W. 852, 854 (Mich. 1921) (observing that leave is generally granted in cases involving questions of important public interest); Arthur F. Greenbaum, *Government Participation in Private Litigation*, 21 ARIZ. ST. L.J. 853, 972 (Winter, 1989) (noting courts "welcome Government participation when confronting complex issues of law arising from federal regulatory programs"). *See also* Universal Oil Prods. Co. v. Root Ref. Co., 328 U.S. 575, 581 (1946) (holding that federal court can always call on government to serve as amicus curiae). The role of government amicus curiae as a friend of the court is further evinced by the abundance of statutes allowing non-judicial branches of government to participate in litigation as amicus curiae. *See e.g.* 5 U.S.C. § 612(b) (1988) (authorizing Chief Counsel for Advocacy of Small Business Administration to appear as amicus curiae); 7 U.S.C. § 13a-2(8) (1988) (authorizing Commodity Futures Trading Commission to appear as amicus curiae); 29 U.S.C. § 792(d)(2)(B) (1982) (authorizing Executive Director of Architectural and Transportation Barriers Compliance Board to appear as amicus curiae); 15 U.S.C. § 3207(b)(2) (1988) (authorizing Secretary of Commerce to appear as amicus curiae); 15 U.S.C. § 3415(b)(2) (1988) (authorizing Secretary of Energy to appear as amicus curiae). *Compare* DeVonish v. Garza, 510 F. Supp. 658, 659 (W.D. Tex. 1981) (stating no requirement for legislative grant of standing for government to appear as amicus curiae) *and* Laufman v. Oakley Bldg. & Loan Co., 404 F. Supp. 791, 792 (S.D. Ohio 1975) (stating no showing required of government to serve as amicus curiae when in public interest) *with Michigan*, 940 F.2d at 164 (recalling traditional purpose of amici as providing court impartial information on matters of public interest) *and* Miller-Wohl, Inc. v. Commissioner of Labor and Indus., Mont., 694 F.2d 203, 204 (9th Cir. 1982) (discussing amicus curiae's public interest role of directing court to law that escaped their attention). *But see* Rucker v.

to research and analyze in an effort to inform the court.[52] The government is also able to enforce judicial decisions and assist the court in achieving its ends.[53]

Government amici's near-party status is also consistent with established legal principles.[54] Article III of the United States Constitution represents a major obstacle to third party participation in litigation.[55] Article III's "separation of powers" doctrine precludes one branch from encroaching on the domain or exercising the powers of another.[56] The "separation of powers" often becomes an issue when a case involves a political question.[57] Permitting the legislative and executive branches to serve as amici allow the courts to address political questions without infringing on the legislative or executive branches.[58]

An additional Article III protection is the "standing to sue" doctrine.[59] "Standing to sue" requires that the party have a sufficient stake in an otherwise justiciable controversy to warrant judicial resolution.[60]

Great Scott Supermarkets, 528 F.2d 393, 394 n.2 (6th Cir. 1976), *overruled on other grounds,* (refusing filing of amicus brief); Wright v. Tennessee, 628 F.2d 949, 952 (6th Cir. 1980) (denying Secretary of Labor permission to file amicus brief because redundant).

[52] *See* Comment, Amicus Curiae, *supra* note 15, at 480 (recognizing government's ability to research and inform court).

[53] *See* Bush v. Orleans Parish Sch. Bd., 191 F. Supp. 871, 876 (E.D. La. 1961) (justifying governmental amici curiae because they involve principles vital to effective administration of justice); *Faubus*, 254 F.2d at 804-05 (justifying courts appointment of U.S. Attorney General as amicus curiae to protect and effectuate its orders); *see also* United States v. Dougherty, 473 F.2d 1113, 1125 n.18 (D.C. Cir. 1972) (recognizing amici assisting court have greater authority than amici assisting defendant).

[54] *See infra* notes 55-68 and accompanying text (discussing how representing public interest makes existence of government amici proper).

[55] *See supra* note 2, and accompanying text (discussing standing requirements).

[56] *See* BLACK'S LAW DICTIONARY 1365 (6th ed. 1990).

[57] *See* BLACK'S LAW DICTIONARY 1358 (6th ed. 1990). The "political question doctrine" states that certain issues are more appropriately handled by another government branch and therefore should not be decided by the courts. *Id.*

[58] *See* Lowman, *supra* note 14, at 1262 (noting governmental amici involvement give federal courts "detached objectivity and enhances its image as decision-maker").

[59] *See* Sierra Club v. Morton, 405 U.S. 727, 731-32 (1972) (requiring concrete stake in outcome of controversy for standing to sue).

[60] *See* BLACK'S LAW DICTIONARY 1405 (6th ed. 1990).

> Standing is a requirement that the plaintiffs have been injured or been threatened with injury by governmental action complained of, and focuses on the question of whether the litigant is the proper party to fight the lawsuit, not whether the issue itself is justiciable. Carolina Environmental Study Group, Inc. v. U.S. Atomic Energy Comm'n., D.C.N.C., 431

Courts have consistently held that matters of public interest outweigh "standing to sue" requirements.[61] Several examples of public interest matters include the distribution of governmental power and extensive civil wrongs.[62] "Standing to sue" is rarely an issue where the government is representing the public interest.[63]

Although governmental amici are given broad powers, these powers are not absolute.[64] For example, governmental amici do not ultimately control the litigation.[65] Furthermore, government amici may not use the original party as a proverbial strawman to express their own views.[66] These limits to government power are sufficient to prevent the government from abusing its amicus status to subvert the interests of a named party.[67] When the government is acting in the public interest and within the above-mentioned limits, the government is acting as a friend

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F.Supp. 203, 218. Essence of standing is that no person is entitled to assail the constitutionality of an ordinance or statute except as he himself is adversely affected by it. Sandoval v. Ryan, Colo.App., 535 P.2d 233, 247. BLACK'S LAW DICTIONARY 1405-06 (6th ed. 1990).

[61] *See e.g.* DeVonish v. Garza, 510 F. Supp. 658, 659 (W.D. Tex. 1981) (stating that government amici curiae do not require legislative grant of standing); Laufman v. Oakley Bldg. & Loan Co., 404 F. Supp. 791, 792 (S.D. Ohio 1975) (stating no showing required of government to serve as amicus curiae when in public interest).

[62] *See* United States v. Ward, 618 F. Supp. 884, 915 (E.D.N.C. 1985) (allowing North Carolina to appear as amicus curiae and support constitutionality of state statute); United States v. Nixon, 418 U.S. 683, 693 (1974) (using amicus to determine interplay between executive power and power of legislature and individual rights).

[63] *Cf.* United States v. California, 332 U.S. 19, 26-27 (1947) (supporting grant of broad powers to U.S. Attorney General to litigate government rights and property).

[64] *See generally* United States v. Texas, 356 F. Supp. 469, 473 (E.D. Tex. 1971) (authorizing amicus curiae to enforce district court's judgment); United States v. Dougherty, 473 F.2d 1113, 1125 n.18 (D.C. Cir. 1972) (authorizing amicus curiae to present and question witnesses); Northside Indep. Sch. Dist. v. Texas Educ. Agency, 410 F. Supp. 360, 362-63 (W.D. Tex. 1975) (authorizing amicus curiae to conduct discovery).

[65] *See* Hoptowit v. Ray, 682 F.2d 1237, 1260 (9th Cir. 1982) (finding error where amici control litigation).

[66] *See id* (ruling it is error for government to use named party as strawman to present its views).

[67] *See generally* Edmond R. Beckwith & Rudolph Sobernheim, *Amicus Curiae-Minister of Justice*, 17 FORDHAM L. REV. 38, 40-42 (1948) (stating that private amici limitations do not apply to governmental amici informing on public interest); George C. Piper, Note, *Amicus Curiae Participation-At the Court's Discretion*, 55 KY. L.J. 864, 870 (1967) (allowing government amici participation in certain circumstances).

to the court in accordance with the original intent of the doctrine of amicus curiae.[68]

B. Private Amici

Private party amici curiae began modestly in America: They were, simply, friends of the court.[69] Unlike their governmental counterparts, private amici lacked standing and were not afforded many of the rights traditionally granted to named parties.[70] One advantage of their non-party status was the inapplicability of res judicata.[71]

Private amici did not become litigating amici overnight.[72] The process evolved slowly and consisted of a series of steps evidenced by three cases.[73] The initial step in the process occurred in the decision of

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[68] *See supra* notes 13-17 and accompanying text (discussing traditional role of amicus curiae). As an example of the effectiveness of government amici and the level to which they have risen, one need only look to the amicus briefs of the Securities and Exchange Commission. David S. Ruder, *The Development of Legal Doctrine Through Amicus Participation: The SEC Experience*, 1989 WIS. L. REV. 1167, 1173 (1989). *See e.g.*, Fratt v. Robinson, 203 F.2d 627 (9th Cir. 1953) (adopting position offered by amicus); Hooper v. Mountain States Sec. Corp. 282 F.2d 195, 201 (5th Cir. 1960) (following amicus' argument). *See generally* McMahon v. Shearson/Am. Express, Inc., 788 F.2d 94, 100 n.8 (2d Cir. 1986) (commenting that Securities and Exchange Commission brief would have been helpful); Eason v. General Motors Acceptance Corp., 490 F.2d 654, 659 (7th Cir. 1979) (Stevens, J.) (citing SEC brief, as amicus curiae, in Superintendent of Ins. of New York v. Bankers Life & Casualty Co., 404 U.S. 6 (1971)).

[69] *See* Universal Oil Prods. Co. v. Root Ref. Co., 328 U.S. 575, 580-81 (recognizing that private amici previously served court). *See generally* Skandia Am. Reinsurance Corp. v. Schneck, 441 F. Supp. 715, 718 n.3 (S.D.N.Y. 1977) (relying on amicus' liquidation and insolvency determinations which are beyond purview of court); Teague v. Lane, 489 U.S. 288, 300 (1989) (discussing issue raised in amicus brief); Alexander v. Hall, 64 F.R.D. 152, 155 (D.S.C. 1974) (emphasizing that amicus curiae is not party to litigation but only assists court in public interest).

[70] *See* Ex Parte Leaf Tobacco Bd., 222 U.S. 578, 581 (1911) (holding non-party not entitled to appeal); Moten v Bricklayers, Masons & Plasterers Int'l Union of Am., 543 F.2d 224, 227 (D.C. Cir. 1976) (holding participating amicus is non-party and therefore not entitled to appeal); FED. R. APP. P. 29 (allowing amicus curiae's motion to participate in oral argument only for extraordinary reasons).

[71] *See* Munoz v. County of Imperial, 667 F.2d 811, 816-17 (9th Cir. 1982) (holding amicus status alone does not invoke res judicata), *cert. denied*, 459 U.S. 825 (1982).

[72] *See infra* notes 72-85 and accompanying text (discussing evolution of private amici from neutral party to litigating party status).

[73] *See supra* notes 18-31 and accompanying text (discussing factors that have transformed amicus curiae doctrine).

Wyatt v. Stickney.[74] In *Wyatt*, government and private party amici worked side-by-side as litigating amici.[75] Although private amici were bound by their governmental counterparts, the case conferred rights on private parties that had previously been reserved for named parties and government amici.[76]

The next step toward litigating amicus status occurred as a result of *EEOC v. Boeing Co.*[77] The *EEOC* court allowed the private amicus to supplement the EEOC's position.[78] Consequently, the rights afforded to private amici included the right to participate in trial, to receive all pleadings, to consult with the EEOC prior to final settlement offers, to participate jointly in motions, to be present at all depositions, and to file briefs.[79] Private amici were still not allowed to conduct discovery, file motions by themselves, or to reject the government's final settlement proposals.[80]

Private amici underwent their final evolution toward becoming litigating amici curiae in *United States v. Michigan*.[81] In that case, the private party amici curiae achieved and lost their status as litigating amici.[82] Due to the public interest and complexity of the case, Judge Enslen allowed the private amicus to serve as both a friend of the court and a representative of a third party interest.[83] Judge Enslen eventually gave the private party or "Knop class" all of the rights of a named party.[84] Indeed, the Knop class enjoyed a status greater than that of a

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[74] 344 F. Supp. 373 (M.D. Ala. 1972).

[75] *See id.* at 375 n.3 (allowing both named parties and amici to participate in hearings).

[76] *See id.* (referring to all amici as one entity); *id.* at 375-76. (observing amici as having submitted briefs, proposed standards, and given testimony).

[77] 109 F.R.D. 6 (W.D. Wash. 1985).

[78] *See id.* at 11 (affording third-party role in litigation in spite of not satisfying requirements for intervention).

[79] *See id.* (affording rights to third-party, which allow them to assist named party prepare for trial).

[80] *See id* (limiting rights afforded to third-party).

[81] *See* 116 F.R.D. 655, 660-61 (W.D. Mich. 1987) (requesting full litigating amicus status because nominal plaintiff did not adequately represent their interests).

[82] *Compare State of Michigan*, 116 F.R.D. at 660-61 (granting litigating amicus status) *with* United States v. Michigan, 940 F.2d 143, 160 (6th Cir.1991) (revoking litigating amicus status).

[83] *See State of Michigan*, 116 F.R.D. at 660-61 (granting amicus curiae status).

[84] *See id.* The Knop class received rights that were previously withheld from private amici including filing a motion to modify, amending a consent decree, or the ability

named party because res judicata did not apply.[85] It would be only a matter of time before their status would be challenged.[86]

C. Judicial Review

Recent judicial review of amicus curiae doctrine has not distinguished between private and government amici.[87] The propriety of governmental amici, however, as discussed in section III (A) above, would suggest the private amicus as the focus of the judiciary's ideological retreat.[88] Holdings in the Sixth and Seventh Circuits, as well as, the Supreme Court's own amendments and recommendations evince this interpretation.[89]

The Sixth Circuit reversed the District Court's holding in *United States v. State of Michigan*.[90] Taking issue with the court-constructed "litigating amicus curiae," the court held:

> To condone the fiction of "litigating amicus curiae," in reality an extra-judicial, de facto named party/real party in interest, would extend carte blanche discretion to a trial judge to convert the trial court into a free-wheeling forum of competing special interest groups capable of frustrating and undermining the ability of the named parties/real parties in interest to expeditiously resolve their own dispute and capable of complicating the court's ability to perform its judicial function.[91]

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to enforce these privileges with the threat of contempt proceedings. *Michigan*, 940 F.2d at 162-64.

[85] *See Michigan*, 940 F.2d at 165 (noting amici not bound by judgments which permitted them to brief or argue).

[86] *See infra* notes 89-103 and accompanying text (discussing judicial review of granting litigating amicus status).

[87] *See infra* note 89-103 and accompanying text (noting that language used in court opinions does not distinguished between private and government amici).

[88] *See supra* note 48-66 and accompanying text (assuming from court opinions and government amici's public interests that judiciary's focus is private amici).

[89] *See infra* note 90-103 and accompanying text (referencing appellate cases and Supreme Court amendments for judiciary's stance on amicus curiae doctrine).

[90] *See Michigan*, 940 F.2d at 166-67 (finding that third-party lacked standing to exercise litigating rights equal to named party).

[91] *Id.* at 166.

The court likened the district court's ruling to the opening of a Pandora's box.[92] Circuit Judge Krupansky concluded that the Knop class was without standing and therefore precluded from exercising any litigating rights.[93] Although, the Sixth Circuit's ruling prevented the Knop class from performing the functions of a named party, it did not impair the class' participation as a traditional amicus curiae.[94]

The Seventh Circuit has taken even greater strides to curb the abuses of the doctrine of amicus curiae in *Ryan v. Commodity Futures Trading Comm'n*.[95] The *Ryan* court recognized that the adversarial capacity of the amicus curiae was well accepted.[96] The court held that an amicus brief is only proper when a party is not adequately represented, when the amicus has an interest in another lawsuit that will be affected by the decision in the present case, or when the party has additional information for the court.[97]

The Supreme Court also reacted to the growing number of private litigating amici by amending Sup. Ct. R. 37 and prescribing revisions to the Federal Rules of Appellate Procedure.[98] Sup. Ct. R. 37 now requires disclosure of authorship and sponsorship.[99] FED. R. APP. P. 29 now requires the standard proffered by *Ryan* decision, namely, that the party seeking leave of the court to file an amicus brief must state "why a brief of an amicus curiae is desirable."[100] The rule provides that the amicus

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[92] *See id.* (predicting that expanding amicus curiae doctrine would result in legal confusion).

[93] *See id.* (finding that amicus did not satisfy intervention requirements to allow litigating rights).

[94] *See id.* (holding that traditional amicus curiae doctrine still applies).

[95] 125 F.3d 1062 (7th Cir. 1997).

[96] *See id.* at 1063 (recognizing acceptance of amicus curiae).

[97] *See id.* (redefining amicus curiae doctrine in context of America's adversarial legal system).

[98] *See infra* notes 99-103 and accompanying text (utilizing disclosure requirements to limit abuse of amicus curiae mechanism).

[99] *See* SUP. CT. RULE 37 (West 1999). Rule 37 provides:

> Except for briefs presented on behalf of amicus curiae listed in Rule 37.4, a brief filed under this Rule shall indicate whether counsel for a party authored the brief in whole or in part and shall identify every person or entity, other than the amicus curiae, its members, or its counsel, who made a monetary contribution to the preparation or submission of the brief. The disclosure shall be made in the first footnote on the first page of text.

Id.

[100] *Compare* FED.R.APP.P. 29 (West 1999) (requiring disclosure of how amicus brief will aid court) *with Ryan* 125 F.3d at 1064 (suggesting that amicus briefs be allowed only when they aid court).

brief is no longer due on the date the named party's brief is due but is due up to one week later.[101] Although this may appear temporally sympathetic, it actually demands stricter compliance with Rule 29: It affords the amicus an opportunity to review the named party's brief and ensure that the amicus brief is not a restatement of the named party's argument.[102] Further, the rule requires the motion for leave to file an amicus brief be filed with the amicus brief, rather than in advance.[103] Having read the named parties' briefs, the Court requires the amicus to adhere more closely with Rule 29 while also providing the courts with a simple threshold mechanism to respond to attorneys who fail to comply.[104] Due to the novelty of these provisions, their effect on attorney conduct and their actual utility in the courts is still unknown.

IV. PROBLEMS WITH THE COURTS' TREATMENT OF AMICUS CURIAE

Amici curiae have evolved from being friends of the court without bias to being advocates and lobbyists with their own agendas.[105] Notwithstanding the Sixth and Seventh Circuit decisions, a question remains whether this new concept of amicus curiae, litigating or otherwise, is acceptable in our society. As described above, government amici are consistent with established legal principles as they work to further the public interest.[106] Therefore, even as a litigating party, government amici are proper.[107] Private party litigating amici, however, are inappropriate,

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[101] *See* FED. R. APP. P. 29 (e) (West 1999).

[102] *See* David B. Smallman, *Amicus Practice: New Rules for Old Friends*, 1999 SEC. LITIG., Vol. 25 No. 2 (noting that prior to FED. R. APP. P. 29 (e) amicus did not have opportunity to review principal brief).

[103] *See* FED. R. APP. P. 29.

[104] *See* Smallman, *supra* note 102 (noting amici must consider principal briefs when they write their own briefs and motions).

[105] *See e.g.* Hoptowit v. Ray, 682 F.2d at 1260 (advocating for prisoner rights); In Re Estelle, 516 F.2d at 483-85 (lobbying on behalf of prisoners); Faubus v. United States, 254 F.2d at 804-05 (lobbying for enforcement of school desegregation order).

[106] *See supra* notes 48-66 and accompanying text (discussing how government amici maintain objectivity in adversarial system in their pursuit of public interest).

[107] *See supra* notes 48-66 and accompanying text (discussing how pursuit of public interest avoids abuse of amicus curiae doctrine).

because they are inconsistent with established legal doctrine: they do not further policy goals or a philanthropic agenda.[108]

Private parties may not serve as litigating amici, because it conflicts with Article III and the Federal Rules.[109] Congress has used the Federal Rules to specify the instances in which third parties may be represented, e.g., class actions, compulsory joinder, and intervention.[110] The case and controversy and standing requirement of Article III are another impediment to private third party participation in litigation.[111] It is, in part, because of these obstacles that private parties are pursuing litigating amici status.[112] Affording private amici with the same rights as named parties would be a prolific source of legal confusion for the bench, bar, and public.[113]

V. FRIENDLY ADVICE FOR THE AMICUS CURIAE

Amicus briefs are no longer a rare occurrence.[114] Many commentators argue that the proliferation of amicus briefs promote efficient litigation by consolidating lawsuits and preserving judicial resources.[115]

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[108] *See* Lowman, *supra* note14 at 1280 (noting that private parties have their own agenda, absent broad policy goals of government amici).

[109] *See supra* notes 89-103 and accompanying text (discussing limits placed on private amici because of their non-public agendas).

[110] *See* FED. R. CIV. P. 23 (West 1999) (outlining requirements for class actions); FED. R. CIV. P. 19 (West 1999) (outlining requirements for compulsory joinder); FED. R. CIV. P. 24 (West 199) (outlining requirements for intervention).

[111] *See* U.S. CONST. ART. III, § 2, cl. 1 (requiring that cases "aris[e] under this Constitution").

[112] *See* Lowman, *supra* note 14, at 1256-58 (utilizing amicus curiae mechanism to circumvent obstacles set up by Federal Rules and Constitution); *but see* Lowman, *supra* note 14, at 1265-66 (suggesting reasons for private parties to pursue litigating amicus status, e.g., vaguely defined, high profile cases).

[113] *See* United States v. Michigan, 940 F.2d 143, 166 (6th Cir. 1991) (describing judicial construct of litigating amicus as inconsistent with Constitution, Federal Rules, and adversarial system).

[114] *See* Howard, *supra*, note 6 at 255 (noting that 416 amicus briefs were filed in 114 cases in Supreme Court in 1982, i.e., 80% out of total of 142 cases); Susan Hedman, *Friends of the Earth and Friends of the Court: Assessing the Impact of Interest Group Amici Curiae in Environmental Cases Decided by the Supreme Court*, 10 VA. ENVT'L L.J. 187 (1991) (observing that U.S. Supreme Court now reviews more amici briefs than party briefs).

[115] *See* United States v. State of Michigan, 116 F.R.D. 655, 662 (W.D. Mich 1987) (stating that concern about resources played role in granting litigating amici status).

In reality, amici, in the absence of rules governing amicus briefs, actually impede litigation.[116] If private party amici are allowed to represent partisan interests, there must be limits.[117] One approach would be for Congress to add a Federal Rule of Civil Procedure as it has with the Federal Rules of Appellate Procedure.[118] This would be consistent with the legislature's traditional role as the branch that regulates the relationship between named parties and third parties.[119]

The Supreme Court has taken the first step by amending Rule 37.6 and requiring disclosure of authorship if a named party authored the brief party and sponsorship if amicus did not pay for the brief.[120] The amicus curiae doctrine could be strengthened, if the rules of other courts required the same, i.e., requiring amici to identify themselves and explain how they expect to aid the court.[121]

Courts, especially on the appellate level, are not simply deciding controversies but are generating judicial precedent.[122] Bringing potential precedential ramifications to the court's attention and helping the court to avoid error should be the focus of the amicus curiae doctrine.[123] Amici curiae do not serve these ends by simply echoing a party position; they should use their expertise generally and focus on the ramifications of a decision rather than focusing on their own interests, determining, for example, whether a court should hold narrowly or broadly.[124] Although

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[116] *See Michigan*, 940 F.2d at 161 (observing that Knop's amicus status proceedings and related events took both time and effort).

[117] *See id.* (noting hazards of amicus curiae).

[118] *See supra* notes 96-106 and accompanying text (beginning by Supreme Court's modification of their rules).

[119] *See* FED. R. CIV. P. 23 (West 1999) (outlining requirements for class actions); FED. R. CIV. P. 19 (West 1999) (outlining requirements for compulsory joinder); FED. R. CIV. P. 24 (West 1999) (outlining requirements for intervention).

[120] *See* Sup. Ct. Rule 37.6 (West 1999).

[121] *See generally* Ferguson v. Brick, 649 S.W.2d 397, 403 (Ark. 1983) (promoting nonpartisan advocacy); United States Fidelity and Guar. Co. v. Victory Land Co. Inc., 410 So. 2d 359, 367 (La. App. 1982) (suggesting that amici offer their perspective rather than restating party position or introducing new arguments).

[122] *See* Andrew M. Low, *Amicus Curiae*, 27-FEB COLO. LAW. 37, 38 (1998) (noting precedential implications of appellate decisions); Randy S. Parlee, *A Primer on Amicus Curiae Briefs*, 62-Nov. WIS. LAW. 14 (1989) (noting importance of court decisions).

[123] *See* Low, *supra* note 122 at 38 (recognizing ability of amicus curiae to inform court of possible precedent ramifications).

the adversarial nature of our legal system will instigate most private amici toward a party position, amici should strive to be as objective as possible. Only then will the amicus curiae truly be a friend to the court.

Michael J. Harris

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[124] *See id* (providing insight into role of amicus curiae). *But see* Paul M. Smith, *Discovery, Dollars, Depositions: The Sometimes Troubled Relationship Between Courts and Their "Friends."* LITIG., p. 28; Summer, (1998) (recognizing dangers of Brandeis Briefs where courts lack expertise and ability to cross examine).