

## APPELLATE LAW

### Amicus Briefs

**A**MICUS CURIAE BRIEFS have become a prominent feature of virtually every U.S. Supreme Court case and the subject of considerable scholarly attention. The rules, trends and practices concerning amicus briefs in the federal circuits are more varied and controversial.

■ *U.S. Supreme Court.* Supreme Court Rule 37 provides that an amicus brief that does not “bring[] to the attention of the Court relevant matter not already brought to its attention by the parties... burdens the Court, and its filing is not favored.” In reality, however, the court “allow[s] essentially unlimited amicus participation.” J. Kearney & T. Merrill, “The Influence of Amicus Curiae Briefs on the Supreme Court,” 148 U. Pa. L. Rev. 743, 764 (2000). Indeed, the tide of amicus briefs has steadily risen, increasing by 800% over the past 50 years. *Id.* at 752. During the October 2005 term, amicus briefs were filed in 96% of the court’s cases. R. Lazarus, “Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar,” 96 Geo. L.J. (forthcoming 2008).

Landmark cases, of course, have always drawn large numbers of amicus briefs. Many of these add little to the court’s deliberations, but the University of Michigan admissions lawsuits, *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Gratz v. Bollinger*, 539 U.S. 244 (2003), demonstrated how influential amicus briefs can be. More than 90 amicus briefs were filed, and many of them, including

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one joined by more than 80 major corporations, made it clear to the court that Justice Lewis Powell’s approach to affirmative action in *Bakke* had become an accepted part of how important institutions in American society operated. See J. Alger & M. Krislov, “You’ve Got to Have Friends: Lessons Learned from the Role of *Amici* in the University of Michigan Cases,” 30 J.C. & U.L. 503 (2004).

#### A brief filed for retired military officers stands out

One brief in particular, filed on behalf of retired military officers, stands out. It showed that the U.S. military believed that a diverse officer corps was essential to its mission and that it was therefore necessary for U.S. military academies and colleges with ROTC programs to consider race in admissions.

Their brief was quoted repeatedly during oral argument, and Justice Sandra Day O’Connor’s decision in *Grutter* relied on the brief in concluding that, like the military academies, the “country’s other most selective institutions” have a compelling interest in racial diversity. 539 U.S. at 331. The military officers’ brief has been described as possibly “the most influential amicus brief in the his-

tory of the Court.” J. Toobin, *The Nine: Inside the Secret World of the Supreme Court* 224 (2007).

While smaller in volume, amicus briefs filed at the certiorari petition stage may be more influential than those filed at the merits stage. The justices have comparatively little time to consider the thousands of cert petitions filed each year, and the concerns expressed by amicus groups can signal the practical importance of a case.

A recent review of cert-stage amicus filings between May 2004 and August 2007 shows that the 15 most prolific amici, principally business and trade associations and conservative legal foundations, had a significant impact—the court granted cert in a striking 27% of the cases in which those groups filed a supporting brief. The U.S. Chamber of Commerce filed the most briefs (55), with a grant rate of 26%. A. Chandler, “Cert-stage *Amicus* Briefs: Who Files Them and To What Effect?,” [www.scotusblog.com](http://www.scotusblog.com) (Sept. 27, 2007).

A similar review of cert-stage amicus filings in the October 2005 term revealed that a paid cert petition’s chance of success rose from 2% with no amicus support to roughly 20% with one supporting amicus brief and 56% with at least four supporting briefs. *Id.*; R. Lazarus, “Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar,” 96 Geo. L.J. (forthcoming 2008).

■ *Federal appeals courts.* Fed. R. App. P. 29 provides that an amicus brief may be filed only with all parties’ consent or by leave of court, and a motion for leave to file must identify the amicus’s interest and the “reason why an amicus brief is desirable and why the matters

asserted are relevant to the disposition of the case.”

The various circuits apply this rule differently. The 7th U.S. Circuit Court of Appeals has adopted stringent standards for accepting an amicus brief, an act it considers “a matter of judicial grace.” *NOW Inc. v. Scheidler*, 223 F.3d 615, 616 (7th Cir. 2000). Judge Richard Posner—not one to mince words—expressed a litany of concerns about amicus briefs, which are “often solicited by parties, may be used to make an end run around court-imposed limitations on the length of parties’ briefs,” “drive up the cost of litigation,” burden judges and “attempt to inject interest group politics into the federal appeals process.” *Voices for Choices v. Illinois Bell Tel. Co.*, 339 F.3d 542, 544 (7th Cir. 2003). In his view, amicus briefs rarely “do more than repeat in somewhat different language the arguments...of the party [the amicus] is supporting.” *Id.* at 545.

Urging the court to scrutinize proposed amicus briefs carefully, Posner suggested that permission to file be granted only when a party is “inadequately represented,” when the amicus has a direct interest in another case that is likely to be affected or when the amicus has “a unique perspective” or “specific information” that will assist the court. *Id.*

Not surprisingly, the number of amicus filings in the 7th Circuit has declined since it articulated its approach. See “*Amicus Curiae* in the Federal Courts of Appeals: How Friendly Are They?,” 55 Case W. Res. L. Rev. 667, 697-98 (2005). That court, however, has not always had the last laugh. In *Scheidler*, the court denied leave for three amici seeking to support anti-abortion protesters. 223 F.3d at 616. At the conclusion of the appeal, the protesters filed a cert petition with three amicus briefs in support; the U.S. Supreme Court accepted all three briefs and granted cert. 535 U.S. 1016 (2002).

The 3d Circuit has been far more welcoming. In *Neonatology Associates P.A. v. Commissioner*, 293 F.3d 128 (3d Cir.), *aff’d*, 299 F.3d 128 (3d Cir. 2002), then-Judge Samuel A. Alito Jr. specifically rejected the 7th Circuit’s restrictive approach. He noted that it is often difficult to tell in advance whether a proposed amicus brief will be helpful and concluded that “it is preferable to

err on the side of granting leave.” *Id.* at 132-33. He also worried that selectively denying permission to file amicus briefs may create “the perception of viewpoint discrimination” and “convey an unfortunate message about the openness of the court.” *Id.* at 133.

The D.C. Circuit has created controversy by rejecting briefs filed by politically powerful amici. In an appeal concerning the rights of Guantánamo Bay detainees, the court rejected an amicus brief offered by a group of former judges,

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including two former chief judges of the D.C. Circuit, on the ground that it contravened a Judicial Conference of the United States advisory opinion barring former judges from using the title “judge” in court filings. *Boumediene v. Bush*, 476 F.3d 934 (D.C. Cir. 2006). In dissent, Judge Judith W. Rogers echoed Alito’s concern that denying an unopposed motion to file an amicus brief “may itself create an appearance of partiality.” *Id.* at 936. In the same case, the court also rejected an amicus filing by three U.S. senators who were involved in the passage of the detainee statute under review. *Boumediene v. Bush*, No. 05-5062 (March 30, 2006 order).

**D.C. Circuit grapples with ‘new issue’ rule**

The D.C. Circuit has also grappled with the general rule that an amicus brief cannot raise new issues or request relief not sought by parties. In *Eldred v. Reno*, 239 F.3d 372 (D.C. Cir. 2001), *aff’d*,

537 U.S. 186 (2003), the majority declined to adopt an amicus’s position because it was “rejected by the actual parties...and therefore is not properly before us.” *Id.* at 378. The dissent contended that the amicus brief did not raise a new *issue* on appeal but merely made a new, more persuasive *argument*.

The two sides locked horns again when a petition for rehearing was filed, with the dissent contending that “the Court’s opinion in this case effectively eliminates any role for amicus curiae in the practice of this circuit, when it holds that an argument raised by an amicus may not be considered by the Court.” *Eldred v. Ashcroft*, 255 F.3d 849, 852 (D.C. Cir. 2001) (Sentelle, J., dissenting).

A few circuits have begun to address amicus participation on rehearing or rehearing en banc. The 3d Circuit allows amicus briefs on rehearing, provided counsel “attempt to ascertain the arguments that will be made” by the party the amicus supports to avoid repeating them. 3d Cir. R. 29.1.

The 9th Circuit deems amicus briefs on rehearing to be “appropriate only when the post-disposition deliberations involve novel or particularly complex issues.” 9th Cir. Advisory Comm. Note to R. 29.

The 10th Circuit hedges its bets; it will “receive but not file” proposed amicus briefs on rehearing, and decide whether to accept the briefs “shortly before oral argument on rehearing en banc if granted, or before the grant or denial of panel rehearing.” 10th Cir. R. 29.1. The Advisory Committee on the Federal Rules of Appellate Procedure is currently considering these issues.

Finally, practitioners should note that a number of circuit rules strongly advise amici to avoid repeating points made in the parties’ briefs (see, e.g., 5th Cir. R. 29.2; D.C. Cir. R. 29(a)) and urge amici to file a joint brief whenever possible. See 9th Cir. Adv. Comm. Note to R. 29-1; D.C. Cir. R. 29(d) (amici on same side “must join in a single brief to the extent practicable”; if not, counsel must certify why a separate brief “is necessary”). ■■