

Amicus Briefs

IN THE UNITED STATES SUPREME COURT

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A Fall From Grace?

In a recent case we received 20 highly partisan amici briefs from the financial community...At the most, two of the briefs had legal significance, while the rest were simply endorsements of the briefs filed by the parties and added nothing to the arguments except the supposed political prestige of the group making the endorsement. To knowingly allow such briefs is to invite a charge of political pressure and, in addition, waste our time.

per curiam opinion, *Ferguson v. Brick*,
279 Ark. 168, 173 (1983)

Posner's 7th Circuit

Denied permission to file amicus briefs that did not add anything to a party's brief.

- Heavy caseloads
- Risk of end-run around court rules
- Cost/length of litigation
- Interjection of interest-group politics

Looked for:

- Inadequate representation of a party
- Direct effect on amicus
- Unique viewpoint or information
 - *Voices for Choices v. Ill. Bell Tel. Co.*, 339 F.3d 542, 544 (7th Cir. 2003)

The Rise of the Amicus Brief as Virtue-Signaling

Increased visibility of amicus brief as publicity for a corporation; part of the “brand;” public show of support for the “right” side

- Same-sex marriage
- Reproductive choice
- Immigration

Manipulation of the legal process for advertising?



Amicus as neutral advisor

Amicus as advocate

Amicus as lobbyist??

Amicus Briefs as Part of Coordinated Strategy

Today, skilled and specialized advocates of the Supreme Court Bar strategize about what issues the Court should hear and from whom they should hear them. They then “wrangle” the necessary amici and “whisper” to coordinate the message. The result is orchestrated and intentional—the product of what we call “the amicus machine.”

“...we make the perhaps surprising claim that the amicus machine is normatively desirable. Others have warned about the influence of the powerful lawyers of the Supreme Court Bar generally. While acknowledging these risks, we argue that—when it comes to amicus briefs—the benefits of specialization outweigh the costs”

- Allison Orr Larsen and Neal Devins, *The Amicus Machine*, 102 *Virginia Law Review* 1901-1968 (2016)

The Decline of Facts and Sources

...or alternately, the rise of weird facts

Misinterpretation/misapplication of social science

- Michael Rustad & Thomas Koenig, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs*, 72 N.C. L. Rev. 91 (1993)

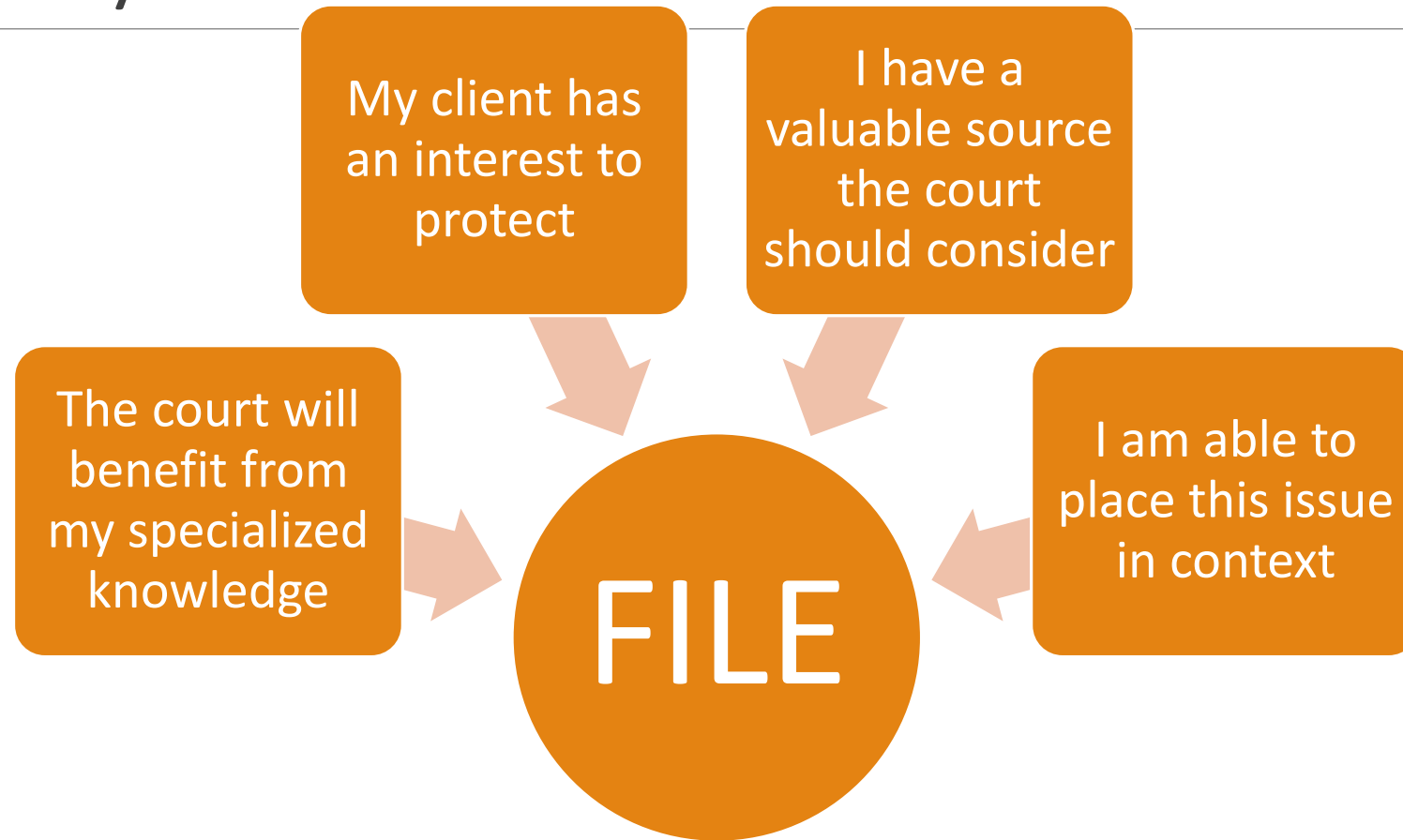
Average Joe as the self-proclaimed "expert"

- Allison Orr Larsen, *The Trouble With Amicus Facts*, 100 Vs. L. Rev. 1757 (2014)

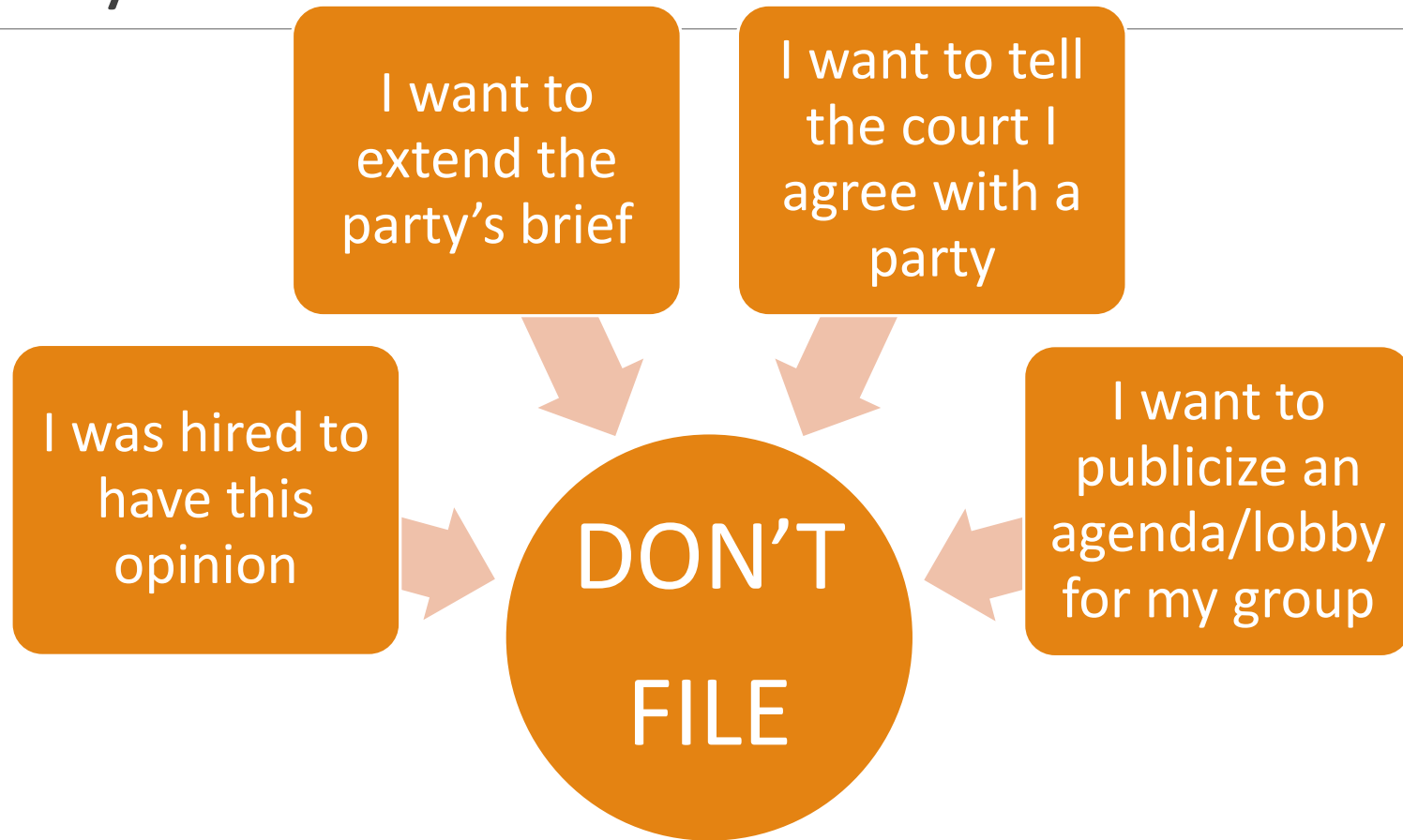
End of Amicus Briefs?

Probably not...but a crackdown may be coming (and maybe should)

Should you file?



Should you file?



Getting Your Brief Read

A judge does not *have* to read your amicus brief.

In an interview, Justice Ginsburg said that her clerks often divide the amicus briefs into three piles: “those that should be skipped entirely, those that should be skimmed, and those that should be read in full.”

Quality of the brief matters

Reputation of the writer matters

Disappointing News

Reader of amicus brief

- Will likely not read in entirety
- Relies on summary of arguments, table of contents, table of authorities
- Looks for new/valuable sources and viewpoints
 - If compelling enough, may read for what Scalia called “truffles”

AT ANY LEVEL – cert. or merits

- Write to help the court, not to advance your interests (or at least both)
- Write as if for U.S. Supreme Court CLERK
 - Give clerks guidance on how to frame an issue
 - Assume your brief will get the same consideration as if before SCOTUS clerk
- Make your “elevator pitch” abundantly clear
- Cite only reliable sources

Getting Your Brief Read

Former SCOTUS clerks say amicus briefs most useful in very technical cases

- They specifically mentioned tax cases as those where amici are helpful
- It was largely the non-legal information that made them useful

Look for new and useful information or arguments

“As a rule, the farthest thing from a party argument is what is most helpful. For example, hard facts or social science data Often you wish you knew more facts than you get from a party brief.”

It's fine! Women
love doing
laundry!

The Brandeis Brief

Muller v. Oregon, 208 U.S. 412 (1908)

- Oregon law limited number of hours women could work in a laundry
- Louis Brandeis' Brief:
- Empirical data to demonstrate the negative impact long workdays had on women's health.
- 100 p. economics & social science: 2 p. legal theory



I'm going to need to
check your sources

Role of the *Amicus*

Provide a view of the situation...



Role of the *Amicus*

Provide a view of the situation...



...that puts it in context.

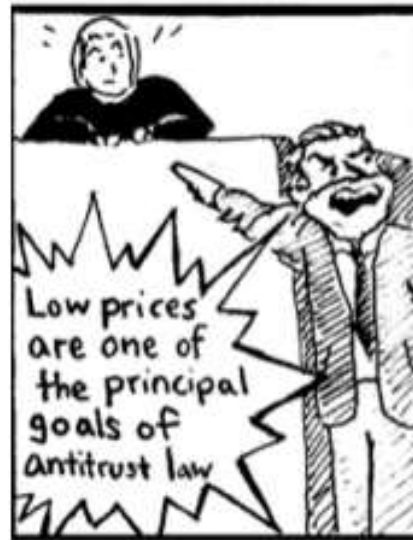
Embrace Originality

Primary goals:

- Give context
- Put issue in perspective

“...to take up and emphasize those points which are novel or which if stressed in the main brief, might dilute or weaken the main forceful arguments.”

Can be less conventional than standard briefs—but must still give the court the respect it deserves.



Amici Enjoy Unusual Freedom in Litigation

“...amici may feel more freedom to experiment with traditional legal forms given their quasi-outsider status to litigation.”

- Elizabeth Porter, *Taking Images Seriously*, 114 Colum. L. Rev. 1687, 1749 (2014) (discussing use of multimedia in litigation)

Generally less regulated by the courts than parties to the case

Can incorporate facts that were overlooked or would add context

- Remember, history is written by the victors – some relevant facts may not have been brought to the attention of the appellate court

May raise arguments the parties are precluded from raising

The Strong Amicus

Occasionally, an amicus brief will make a significant impact on the justices' thinking.

***Grutter v. Bollinger*, 539 U.S. 306 (2003)** – challenge to race-conscious admissions policy

- Supreme Court found compelling interest in attaining a diverse student body
- Justice O'Connor, writing opinion, cited extensively to amicus brief filed on behalf of retired military officers supporting affirmative action to promote diversity
- O'Connor was the swing vote; amicus brief is believed to have influenced her decision



The Strong Amicus

Grutter amicus brief, 2003 WL 1787554

- Short and direct
- Extensively researched
- Established wider effects of decision (on the government's national security interest)
- Placed case in historical context
- Concise, quotable sentences
- Showed familiarity with case and all briefs
- Provided a wealth of statistics
- Established cool, logical tone

Amicus Curiae and Stare Decisis

The Supreme Court has identified four factors that it considers when deciding whether to overturn a case despite *stare decisis*:

- (1) unworkable old rule;
- (2) level of reliance;
- (3) change in related law; and
- (4) change in facts

Planned Parenthood of Southeast Pennsylvania v. Casey, 505 U.S. 833, 854 (1992).

Amici are uniquely positioned to expound on these factors

Briefing Basics

The Table of Contents should make your whole argument. It is your outline.

- Provide a guideline of how to make the decision

Write simply and logically

Be as brief and clear as possible, and *focus only on the point you're trying to make. You are not there to argue the case.*

Offer context

- Introduce extraneous facts, if necessary
- Show where the issue belongs in the grand scheme of things
- Offer alternate justification for decisions you seek
- Give *reliable* facts and statistics to back up your statements

Tell the court what you want!

Law and Record

Show familiarity with the law and briefs on the record

Part of effective advocacy is following the procedural rules

Pull all relevant rules – appellate procedure, amicus-specific rules, local rules, rules regarding attorney admission, and make a checklist



Useful advice: Don't anger the court clerk

Know Your Stuff:

Time-sensitive

- Pro hac vice?
- Local counsel needed?
- Need to give notice?
- Need consent of parties?

Fees

- How much?
- Paid to whom?

Motion

- Contents
- Formatting
- Filing /Service/Certificates
 - File with brief, or before?

Brief

- Contents
- Formatting
 - Font (including footnote font)
 - Margins
 - Spacing
 - Form of citations
 - Cover format/color
 - Binding
- Filing/Service/Certificates
 - Need original signatures?
 - How many copies to the court?
 - Considered timely on day received or day postmarked?

Appendix

- Necessary?
- Format/indexing



Respect your reader

These things affect the court's perception of your quality!

- Nice binding
- Proper color
- Pleasing to look at
- Easy to read

Sources

Allison Orr Larsen and Neal Devins, *The Amicus Machine*, 102 Virginia Law Review 1901-1968 (2016)

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

Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Briefs on the Supreme Court*, 148 U. Pa. L. Rev. 743

Helen A. Anderson, *Frenemies of the Court: the Many Faces of Amicus Curiae*, 49 U. Rich. L. Rev. 361 (2015)

Judge Neal Nettesheim & Clare Ryan, *Friend of the Court Briefs: What the Curiae Wants in an Amicus*, Wis. Law., May 2007

Brandon D. Harper, *The Effectiveness of State-Filed Amicus Briefs at the United States Supreme Court*, 16 U. PA. J. CONST. L. 1503 (2014)

Margaret Meriwether Cordray & Richard Cordray, *The Solicitor General's Changing Role in Supreme Court Litigation*, 51 B.C. L. Rev. 1323 (2010)

Paul M. Collins Jr., *Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation*, 38 Law & Soc'y Rev. 807 (2004)

Michael Rustad & Thomas Koenig, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs*, 72 N.C. L. Rev. 91 (1993)

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