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THE PRACTICE

Justices Are Paying More Attention to Amicus Briefs

A review by Arnold & Porter finds "friend-of-the-court" participation in 96 percent of argued cases.

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What do satirist P. J. O'Rourke, Senator Marco Rubio, the National Football League and 100 law professors have in common? They each filed friend-of-the-court briefs with the U.S. Supreme Court during the 2013-14 term. All told, the court received more than 800 amicus briefs in the 67 argued cases with signed opinions. That's 24,000 pages or 7.2 million words—"War and Peace" a dozen times over. For court watchers, this should come as no surprise. In recent years, the justices have had a record number of "friends." But in this, our fourth year analyzing the high court's amicus docket for The National Law Journal, we did find a few surprises.

If 800 amicus briefs seems overwhelming, consider that the 2012-13 term had a record-breaking 1,001 briefs. While the 2013-14 term didn't reach those historic proportions, amicus participation did reflect the new norm: "[A]n amicus brief is now filed in virtually every case the U.S. Supreme Court hears, and in big marquee end-of-June type cases amicus briefs will regularly number in the double digits." Allison Orr Larsen, "The Trouble with Amicus Facts," 100 Va. L. Rev. 10-11 (forthcoming 2014).

Make that triple digits, if you count blockbuster cases decided together. The marriage-equality cases generated 156 amicus briefs in 2012-13 and the health care cases 136 briefs in 2011-12. Still, the 2013-14 term was in record-breaking territory with 82 amicus briefs filed in *Burwell v. Hobby Lobby*, the contraception-mandate case.

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With amici curiae now participating in 96 percent of argued cases, it's no longer the proliferation of friend-of-the-court briefs that draws attention but rather the absence of amicus support. During oral argument in *Argentina v. NML Capital*, for example, Justice Antonin Scalia highlighted the conspicuous lack of amicus participation by foreign governments. In response to the solicitor general's argument that the decision below harmed foreign sovereigns, Scalia asked, "Why haven't foreign countries protested? … They file amicus briefs all the time and if this is as horrific as you are painting it, we would have had some briefs from them."

Although there were fewer briefs than during the preceding term, the justices showed an increased reliance on them. In 2013-14 they cited amicus briefs in 60 percent of the cases with signed opinions that had amicus participation. That's up from the 2012-13 term, when the justices cited amicus briefs in 53 percent of those cases, despite having more briefs to choose from.

The solicitor general remained "king of the citation-frequency hill" in 2013-14. Joseph Kearney & Thomas Merrill, "The Influence of Amicus Curiae Briefs on the Supreme Court," 148 U. Pa. L. Rev. 743, 760 (2000). The justices cited the government's briefs in 54 percent of the cases in which the United States appeared as amicus, down from 67 percent in the preceding term. The court's citations to "green briefs"—nongovernment amicus briefs—increased slightly. In 2013-14, the justices cited 8 percent of the 719 green briefs in about one-third of signed opinions. This was up from just 5 percent of the 907 green briefs in one-quarter of the opinions the prior term.

Of course, a justice's citation to a brief does not necessarily mean amici influenced the court. Academics long have tried to quantify the influence of amicus briefs, with little success. See, e.g., Helen A. Anderson, "Frenemies of the Court: The Many Faces of Amicus Curiae," pp. 15-16, Soc. Sci. Research Network (2014) (discussing studies). Nevertheless, the fact that justices routinely cite so many briefs suggests they help in the court's decision-making.

WHO GETS NOTICED AND WHY?

Like books, amicus briefs are sometimes judged by their covers—in particular the identity of the amicus and even the lawyers

Cases Set for Argument 2013-14

	Number of cases	Nongovernment amicus briefs	U.S. amicus briefs	State/local gov amicus briefs
Signed decisions	67	719	37	49
Dismissed	2	11	1	1

listed on the front of the briefs. Studies and experience suggest that briefs submitted by organizations known for quality submissions and written by established Supreme Court practitioners get more attention. Antonin Scalia & Bryan A. Garner, Making Your Case: The Art of Persuading Judges 103 (2008); Kelly J. Lynch, "Best Friends? Supreme Court Law Clerks on Effective Amicus Curiae Briefs," 20 J.L. & Pol. 33, 46-56 (2004). That held true in the 2013-14 term. The U.S. Chamber of Commerce and the National Association of Criminal Defense Lawyers—long known for their outstanding briefs—were the only amici cited in multiple cases.

Briefs by academics also get "closer attention—at least initially." Lynch, at 52. Despite some criticism of "scholar briefs," see Richard H. Fallon Jr., "Scholars' Briefs and the Vocation of a Law Professor," 4 J. Legal Analysis 223 (2012), the justices in 2013-14 cited law professor amicus briefs in 18 percent of cases. Most notably, the court kicked off the 2013-14 term by issuing an unusual order directing the parties to "be prepared to address at oral argument the arguments raised" in a professor's amicus brief in *Atlantic Marine v. U.S. District Court*. "Justices' Order: Read This Brief," NLJ, Oct. 2, 2013. The court discussed the professor's position in the opinion but ultimately declined to decide it.

More than half of the green briefs cited by justices in 2013-14 were written by experienced Supreme Court practitioners. During argument in *Halliburton v. Erica P. John Fund*, for instance, several justices discussed an amicus brief by well-known advocate John Elwood. "Justices Might Shy from Overturning Class Action Precedent," NLJ S. Ct. Brief, March 5, 2014.

Ultimately, it's still what's inside that counts. Law clerks report finding amicus briefs most helpful in cases involving highly specialized or obscure areas of the law or in cases involving medical or scientific issues. Lynch, at 41-42. The justices in 2013-14 cited amici for information in technical legal areas, such as how a constitutional amendment gets on the ballot in Michigan (*Schuette*) or the content of compacts between states and Native American tribes (*Bay Mills*). They also cited amici on the criteria for defining mental disabilities (*Hall*) and the health aspects of contraceptive coverage (*Hobby Lobby*).

A forthcoming law review article criticizes another common area of amicus citation: "legislative facts," defined as "generalized facts about the world that are not limited to any specific case." Larsen, at 2. Sure enough, the justices in 2013-14 cited amicus briefs for various legislative facts, such as how frequent-flier miles accumulate (*Northwest*), the data capacity of cellphones (*Riley*) and how 911 systems work (*Prado Navarette*).

The value of information provided by interest groups with agendas, however, is open for debate. Justice Sonia Sotomayor, writing for the court in *United States v. Castleman*, cited an amicus brief for the social-science definitions of "domestic violence" to clarify the meaning of that term in the Armed Career Criminal Act. Scalia's dissent, however, took issue with a definition supplied by "advocacy organizations … that (unlike dictionary publishers) have a vested interest in expanding the definition." And in *Hobby Lobby*, Justice Samuel Alito declined to consider "amici's intensely empirical argument" about employee health insurance costs, observing that the federal government, "which presumably could have compiled the relevant statistics, has never made this argument."

During the past four terms, the justices have varied—often significantly—in how often they cite amicus briefs in their opinions. See Franze/Anderson, NLJ S. Ct. Brief, Sept. 18, 2013; Franze/Anderson, NLJ, Sept. 24, 2012; Franze/Anderson, NLJ S. Ct. Brief, Aug. 24, 2011.

In the 2013-14 term, Scalia—who in our past reviews was the justice least likely to cite amicus briefs—was the top amicus citer, referencing amicus briefs in nearly 60 percent of his majority, dissenting and concurring opinions. By contrast, Sotomayor, who averaged the highest citation rate for the past few terms, was near the bottom in 2013-14.

Although no clear pattern emerges concerning whether a particular justice will cite an amicus brief, what does appear to influence citation rates is whether the case is divisive. In the 2013-14 term, the justices cited amicus briefs in 80 percent of their 5-4 decisions, compared to just 54 percent of cases in which the decision was unanimous.

Our review of the last four terms indicates that nonparty organizations and individuals have greater access to and engagement with the high court than at any time. Whether that public participation is a good thing or correlates with influence is something academics will continue to debate. The past four terms, however, leave little doubt that amici provide information, perspectives and arguments that the court finds helpful to its decision-making process—even if the justices don't always agree with their "friends."

Anthony J. Franze and R. Reeves Anderson are members of Arnold & Porter's appellate and Supreme Court practice. The firm represented amici in some of the cases referenced in this article. Deborah Carpenter helped compile these data.

SUPREME COURT'S AMICUS CITATIONS

Rate of citations by justices in majority, concurring or dissenting opinions in cases with amicus participation.