

## How Do You Make Amicus Briefs a True Friend of the Supreme Court?

By Jimmy Hoover

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**A**s the U.S. Supreme Court's docket has steadily shrunk over the decades, the number of amicus briefs filed in the court has exploded.

"I think fewer cases means more concentrated attention on the cases that are up there," said Anthony Franze, a Supreme Court lawyer at Arnold & Porter who has studied amicus filings in the high court for more than a decade. "It's no longer really jaw dropping to see a case that has more than 100 amicus briefs in it."

Filing briefs of *amicus curiae*, or "friend-of-the-court," has become a routine part of the practices of Washington-based Supreme Court shops amid the steady decline of merits cases from well over 100 a few decades ago, to between 60 and 70 today. Once rare, these submissions offer interested non-parties a way to potentially influence the Supreme Court's decision.

And they are often highly coordinated affairs spearheaded by the parties' lawyers. William & Mary Law School Professor Allison Larsen, who co-authored a 2016 article on "The Amicus Machine," has expressed concern over the influence of these third-party filings.

"I worry that the facts that the justices are citing are facts that have not been tested by the adversarial process," Larsen said, pointing out that amicus briefs often "come in at the very last minute and there are so many that it's hard for the parties to respond to them."



Photo: Diego M. Redzinski/ALM

### U.S. Supreme Court building in Washington.

Yet the Supreme Court has shown little interest in curbing the flow of outside briefs. To the contrary, the court recently got rid of the requirement that would-be amicus filers first obtain consent from the parties.

So with the court likely to remain inundated with amicus submissions for the foreseeable future, practitioners are stuck with a fundamental quandary: How do you get the justices to actually read them? After all, the late Justice Ruth Bader Ginsburg revealed in 2018 that she directed her clerks to separate amicus briefs into three piles—read, skim and skip—with the largest "by far" being the skip pile.

To help answer that question, the National Law Journal reached out to some of the authors of amicus briefs that were cited in Supreme Court majority opinions last term.

## Say Something New

The first thing most successful amicus filers will tell you is what not to do. Repeating the legal arguments of the parties is a major no-no.

As Jeremy Marwell of Vinson & Elkins put it: “Are you adding something new beyond the briefs of the parties?”

Marwell’s amicus brief on behalf of various trade associations and water users was the only amicus filing cited in Justice Brett Kavanaugh’s majority opinion in *Arizona v. Navajo Nation*.

“The court often has very excellent briefing from the parties on both sides of a case,” Marwell said. “Amicus briefs that recycle or put a perhaps slightly different spin on the same basic textual arguments, or doctrinal arguments, I think sometimes can be less helpful to the court than information that, for whatever reason, the parties to the case may not be conveying.”

Indeed, Sam Hirsch of Jenner & Block says amicus filers should actually take the name of their role to heart rather than “act like you’re a mechanism for evading the parties’ word limits.”

“Amicus curiae is Latin for friend of the court, so actually try to be helpful to the court,” recommended Hirsch, whose brief on behalf of computational redistricting experts was cited in a key passage of Chief Justice John Roberts Jr.’s majority opinion in last term’s blockbuster Voting Rights Act case, *Allen v. Milligan*.

“You may have strong views, as I did in this case and my clients did in this case, as to who should prevail,” Hirsch said. “But the point is that you’re not there really advocating on behalf of a party. You’re trying to help the court to deal with very complex and especially significant matters.”

## Provide Expertise and Experience

For Hirsch, being helpful to the court meant breaking down the complex and oft-misunderstood field of computational redistricting, i.e., the method of using computer software to generate electoral maps.

In *Allen v. Milligan*, the state of Alabama argued it did not have to create a second majority-Black district to comply with Section 2 of the Voting Rights Act. The state said that experts had used software to generate millions of maps using “traditional redistricting criteria” and that none had resulted in a second Black-majority district.

The introduction of computers into the redistricting process “really created a lot of confusion about what computers are useful for and what they’re not useful for,” Hirsch told the NLJ. Having worked with each of the undersigned experts in voting rights litigation previously, Hirsch and his colleagues at Jenner & Block explained to the court in the brief that it is “computationally intractable, and thus effectively impossible” to enumerate all possible districting plans.

In other words, Hirsch told the NLJ, “having a million maps doesn’t really tell you much about what the people look like.”

Roberts cited Hirsch’s amicus brief in *Allen v. Milligan* to reject Alabama’s algorithmic evidence. “[Alabama’s] point is that two million is a very big number and that sheer volume matters,” the chief justice wrote. “But as elsewhere, Alabama misconceives the math project that it expects courts to oversee. A brief submitted by three computational redistricting experts explains that the number of possible districting maps in Alabama is at least in the ‘trillion trillions.’”

Justice Samuel Alito Jr. was concerned by the chief justice’s reliance on the brief, writing in his dissent, “I think it is unwise for the Court to make their argument part of our case law based solely on this brief.”

According to Hirsch, advocates shouldn’t shy away from technical subjects, but should still try to translate them into plain language for the justices.

“An advocate writing for this court has the benefit of knowing that his or her audience is stone cold brilliant and can handle anything you throw at them,” he said. “That said, they’re experts foremost in the law, not in mathematics, or in

computational science. So there is somewhat of a challenge in turning those technical arguments into somewhat plain English, but I'm not sure it's all that different from what lawyers in a lot of fields do everyday, where they work with expert witnesses in highly technical fields but have to make their product intelligible to judges and sometimes to jurors."

Real-world experience can similarly provide insights beyond the legal arguments addressed by parties to a case.

In *Sackett v. Environmental Protection Agency*, Michael B. Kimberly of McDermott Will & Emery sought to challenge what he considered to be the misguided narrative that stripping certain wetlands of federal protections would necessarily mean a regulation vacuum for those areas.

"The experience of the state farm bureaus on the ground dealing with state legislatures, dealing with state regulators, was just fundamentally at odds with that narrative," said Kimberly, who filed an amicus brief on behalf of those state farm bureaus in support of a narrower definition of "waters of the United States" subject to EPA regulation. "Our effort in the brief was to paint the picture for the court of what regulation would look like if there were no federal Clean Water Act at all and the answer is there would still be very robust regulation of the nation's water resources."

Kimberly's brief ended up being the only amicus brief cited in Alito's majority opinion.

"It's always gratifying to see an amicus brief cited that we worked on," said Kimberly. "It's even cooler that it's the only one that's cited in the opinion. Particularly in a case like *Sackett v. EPA* where there are dozens of briefs filed, to be the one that stands out as helpful to the justices is gratifying and rewarding."

According to Franze, the effectiveness of amicus briefs is hard to measure.

There are, of course, times when the justices address certain arguments made by amici at oral arguments. And it's of course possible that others play some more subtle role behind the scenes. But to what extent outside submissions affect the outcome of a case is a mystery to all but the justices themselves.

"We'll never know whether a brief truly influenced any decision-making," said Franze. "The closest proxies to see if a brief is useful is to see if a justice cited it and that's probably the best we're gonna get to see if it had any influence at all."

Larsen, who testified before the Senate Judiciary Committee in 2021 on Supreme Court fact-finding, remains concerned that amicus briefs offer the justices a way to find their own facts outside of the adversarial process.

"Everyone is going to shade their argument and their factual narrative in the way that benefits their client—that's good advocacy," she said.

The difficulty she said is figuring out what to do about it.

"It's a very hard issue to do anything about," she said. "I've given it a lot of thought and I'm not sure I've come up with any airtight solutions."

Larsen is not calling for the elimination of amicus briefs.

"I'm not sure that would be a better world," she said.

Instead, Larsen called for more disclosure rules surrounding the interests being advanced in amicus filings.

For Franze, the explosion of amicus briefs leaves the potential for "information overload." Still, the presence of law clerks should help to "filter and focus on briefs that really should get more attention."

"I do think the court has been able to manage it," Franze said. "They continue to cite amicus briefs in over half of their opinions so I think there is some indication that they find them at least useful."