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RESOLVING AMICUS CURIAE MOTIONS IN THE THIRD CIRCUIT AND BEYOND

*Carl Tobias**

I. INTRODUCTION

Amicus curiae briefs are deeply woven into the fabric of modern federal appellate practice. Indeed, amici curiae submit briefs in approximately ninety percent of the cases that the United States Supreme Court entertains, and the Justices deny a minuscule number of amicus requests to participate. Amicus practice is less ubiquitous in the United States Courts of Appeals. Amici seek to file comparatively few briefs, nearly all of which the appellate courts permit, while many tribunals have not developed a comprehensive jurisprudence for resolving amicus motions. Nonetheless, the United States Court of Appeals for the Seventh Circuit has articulated rather stringent criteria, which it has strictly applied to limit amicus involvement, even as the Third Circuit has formulated less restrictive standards that the court has generously enforced to facilitate amicus participation. The significance of federal appellate court amicus practice will only grow as the twelve regional circuits increasingly become the courts of last resort for their geographic areas because the Supreme Court hears so few appeals. These propositions mean that federal appellate court disposition of amicus curiae motions warrants assessment, which this Article undertakes, concluding that the appeals courts should generally follow the Supreme Court and Third Circuit approaches as illuminated by certain aspects of the Seventh Circuit treatment.

The Article's second Part scrutinizes the origins and development of amicus curiae practice in the Supreme Court and in the regional circuits. The next Part analyzes the contemporary debate over how the appellate courts should address amicus curiae requests to file briefs. More specifically, it compares the

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criteria that the Seventh and Third Circuits have enunciated and how the courts have applied the standards. The segment detects variation in the regional circuits' practices, even though most appeals courts have not articulated a thorough amicus jurisprudence in published opinions. The Article concludes by proffering suggestions for the future resolution of amicus curiae motions. The last Part recommends that appellate tribunals continue granting virtually all requests to submit briefs that amici make. The appeals courts should also capitalize on and carefully integrate superior dimensions of United States appellate jurisprudence related to amicus motions by essentially adopting the flexible Supreme Court and Third Circuit approaches, and by selectively applying the Seventh Circuit's criteria and its guidance, which amplifies the standards.

II. THE ORIGINS AND DEVELOPMENT OF AMICUS PRACTICE

The origins and development of amicus curiae practice in the federal appellate courts might appear to deserve relatively limited exploration in this piece because numerous commentators have rather comprehensively assessed that history.¹ Nonetheless, somewhat thorough examination of the background is appropriate, as the review should inform understanding of modern amicus practice, the contemporary debate over how appeals courts should decide amicus motions, and this issue's felicitous resolution.

A. Supreme Court Practice

Amicus curiae practice has been most prominent in the United States Supreme Court. Increasing numbers of amici have tendered briefs, and the Justices have traditionally been quite receptive to motions that amici file under Supreme Court Rule 37. This provision imposes practically no requirements other than that the submission inform the Court of the ami-

1. See, e.g., Ruben J. Garcia, *A Democratic Theory of Amicus Advocacy*, 35 FLA. ST. U. L. REV. 315 (2008); Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L.J. 694 (1963); Linda Sandstrom Simard, *An Empirical Study of Amici Curiae in Federal Court: A Fine Balance of Access, Efficiency and Adversarialism*, 27 REV. LITIG. 669 (2008); John Harrington, Note, *Amici Curiae in the Federal Courts of Appeals: How Friendly Are They?*, 55 CASE W. RES. L. REV. 667 (2005).

cus's interest and of "relevant matter not already brought to its attention by the parties," thus admonishing that amicus input that repeats litigant contributions is disfavored, and few opinions have scrutinized or explained the rule's strictures.² The Justices have granted virtually all motions for leave to file amicus briefs, and numerous judges and legal scholars have observed that the Supreme Court effectively allows unlimited participation by amici and that the Justices will probably not modify this solicitous approach in the future.³ An assessment published during 2000 concluded that amici tendered briefs in eighty-five percent of Supreme Court appeals and that the figure increased exponentially over the preceding half century.⁴ Amicus filings have substantially affected the development of considerable Supreme Court substantive jurisprudence, figuring prominently in such landmark opinions as *Sweatt v. Painter*, *Regents of Cal. v. Bakke*, and *Roe v. Wade*.⁵ Several empirical studies have ascertained that the briefs have significantly influenced the Justices' determinations to grant petitions for writs of certiorari and the underlying Supreme Court decisions on the merits.⁶

2. *N.Y. v. Uplinger*, 467 U.S. 246, 248 (1984) (addressing relevance); see SUP. CT. R. 37(1) ("[A] brief that does not" inform the Court of "relevant matter not already brought to its attention by the parties . . . burdens the Court and . . . is not favored."); Jaffee v. Redmond, 518 U.S. 1, 35-36 (1996) (Scalia, J., dissenting); EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 734-40 (9th ed. 2007); *infra* notes 7, 9-11, 57-58 and accompanying text.

3. *Am. Coll. of Obstetricians & Gynecologists v. Thornburgh*, 699 F.2d 644, 647 (Higginbotham, J., dissenting) (3d Cir. 1983); Gregory A. Caldeira & John R. Wright, *Amici Curiae Before the Supreme Court: Who Participates, When, and How Much?*, 52 J. POL. 782, 784-87 (1990); Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 762 (2000); Garcia, *supra* note 1, at 348.

4. See Kearney & Merrill, *supra* note 3, at 744; see also GRESSMAN ET AL., *supra* note 2, at 740-41; JUDITHANNE SCOURFIELD MCLAUCHLAN, CONGRESSIONAL PARTICIPATION AS AMICUS CURIAE BEFORE THE U.S. SUPREME COURT 28 (2005); Simard, *supra* note 1, at 686.

5. *Thornburgh*, 699 F.2d at 647 (Higginbotham, J., dissenting) (citing *Sweatt v. Painter*, 340 U.S. 846 (1950), *Regents of Cal. v. Bakke*, 438 U.S. 265 (1978), and *Roe v. Wade*, 410 U.S. 113 (1973)); Kearney & Merrill, *supra* note 3, at 767-74; Harrington, *supra* note 1, at 675-76; see Gregory A. Caldeira & John R. Wright, *Organized Interests and Agenda Setting in the U.S. Supreme Court*, 82 AM. POL. SCI. REV. 1109, 1122 (1988). In *Mapp v. Ohio*, 367 U.S. 643, 646 n.3 (1961), the Court adopted a rule that only an amicus espoused, and in *Teague v. Lane*, 489 U.S. 288, 300 (1989), it ruled on an issue "raised only in an amicus brief," but the Justices generally do not address issues that only amici raise. See, e.g., *N.J. v. N.Y.*, 523 U.S. 767, 781 n.3 (1998); *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 154 n.2 (1983); see also Kearney & Merrill, *supra* note 3, at 745 n.5; *infra* notes 13-14 and accompanying text.

6. Kearney & Merrill, *supra* note 3, at 787-811; Caldeira & Wright, *supra* note 5, at 1122; see Jaffee, 518 U.S. at 35-36 (Scalia, J. dissenting) (expressing skepticism about amicus briefs); Stephen Breyer, *The Interdependence of Science and Law*, 82 JUDICATURE 24, 26 (1998) (finding ami-

B. Appeals Court Practice

Amicus curiae practice is less widespread in the federal appellate courts, and a few regional circuits have developed a jurisprudence concerning amicus participation that appears somewhat more restrictive than that articulated by the Supreme Court. Federal Rule of Appellate Procedure 29, which governs amicus curiae practice, resembles Supreme Court Rule 37 and provides rather limited guidance.⁷ Federal and state governmental entities may file briefs without parties' consent or leave of court, but private amici must secure court permission, unless the litigants consent.⁸

A motion to file an amicus brief "must be accompanied by the proposed brief and state: (1) the movant's interest and (2) the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case."⁹ This phraseology imposes interest, desirability, and relevance requirements on amicus participation—(1) in comparison with Supreme Court Rule 37, which principally addresses interest and relevance, and (2) in contrast to Federal Rule of Civil Procedure 24, which mandates that putative intervenors of right show they have an interest in the litigation that the case's resolution will impair and that the parties will inadequately represent.¹⁰ Rule 29's three strictures are general and open-ended, and the desirability and relevance notions are similar. Moreover, the Judicial Conference Appellate Rules Advisory Committee Note, which attended the provision's 1998 revision, admonished that the relevance phrasing was added to reflect analogous terminology in Supreme Court Rule 37(1) "[b]ecause the relevance of the matters asserted by an amicus is ordinarily the most compelling reason for granting leave to

cus briefs help educate judges). As to the effect on certiorari, see *Georgia v. Evans*, 316 U.S. 159, 161 (1942) and H.W. PERRY, JR., DECIDING TO DECIDE 135-37 (1991).

7. Compare SUP. CT. R. 37, with FED. R. APP. P. 29; see also *supra* notes 2, 5 and accompanying text; *infra* notes 11, 17, 57 and accompanying text.

8. FED. R. APP. P. 29(a); see also SUP. CT. R. 37(2)-(4); *infra* note 24 and accompanying text.

9. FED. R. APP. P. 29(b). This provision resembles SUP. CT. R. 37(3)(b).

10. Compare FED. R. APP. P. 29(b), with SUP. CT. R. 37 and FED. R. CIV. P. 24(a). See *Thornburgh*, 699 F.2d at 646 (Higginbotham, J., dissenting); Harrington, *supra* note 1, at 669. Successful intervenors enjoy party status and benefits, such as discovery rights, which amici do not. See generally Carl Tobias, *Standing to Intervene*, 1991 WIS. L. REV. 415 (1991); see also *Thornburgh*, 699 F.2d at 646 (Higginbotham, J., dissenting) (contrasting a motion to intervene as a party with a motion for leave to file an amicus brief); *infra* notes 38, 40, 56 and accompanying text.

file," while the appellate courts allow amicus participation in a substantial percentage of circumstances.¹¹ A small number of regional circuits has developed a very comprehensive jurisprudence that implicates amici or has been particularly strict about policing amicus involvement, even though comparatively recent opinions from Judge Richard Posner in the Seventh Circuit and Judge Samuel Alito in the Third Circuit have articulated a relatively thorough jurisprudence, with Judge Posner somewhat restrictively treating amicus participation.¹²

A few judges have interpreted the modern appellate rule to prohibit amici from addressing issues that parties have not raised, from introducing evidence that the litigants have failed to present, or from seeking relief that the parties have not requested, even as other jurists have questioned these views.¹³ The appeals courts have relied on amicus briefs for numerous propositions, such as relevant factual information, pertinent legal issues, applicable statutory interpretations, and third party effects which judicial opinions might impose.¹⁴

Contemporary amici curiae no longer function solely as true friends of the courts as they conventionally did.¹⁵ Rather, a modern amicus often has some type of adversary interest in the issues that the appeal presents, and can frequently be an extension of a party to the litigation.¹⁶ Supreme Court Rule 37

11. *Neonatology Assocs. v. Comm'r*, 293 F.3d 128, 133 (3d Cir. 2002); *Thornburgh*, 699 F.2d at 647 (Higginbotham, J., dissenting); FED. R. APP. P. 29, 1998 advisory committee's notes; Garcia, *supra* note 1, at 326; Harrington, *supra* note 1, at 670; *see also supra* notes 2-4, *infra* note 57 and accompanying text.

12. *See generally* *Voices for Choices v. Ill. Bell Tel. Co.*, 339 F.3d 542 (7th Cir. 2003); *Neonatology Assocs. v. Comm'r*, 293 F.3d 128 (3d Cir. 2002); *see also infra* notes 21-51 and accompanying text.

13. *See Resident Council of Allen Parkway Vill. v. HUD*, 980 F.2d 1043, 1049 (5th Cir. 1993). The rarefied nature of this debate is illuminated by the majority and dissenting opinions in *Eldred v. Reno*, 239 F.3d 372, 378, 383-84 (D.C. Cir. 2001), *aff'd on other grounds sub nom. Eldred v. Ashcroft*, 537 U.S. 186 (2003); *see also* Harrington, *supra* note 1, at 673; *supra* note 5; *infra* note 14 and accompanying text.

14. *See, e.g., Al-Marri v. Pucciarelli*, 534 F.3d 213, 221 n.3 (4th Cir. 2008) (Motz, J., concurring in the judgment); *Thompson v. County of Franklin*, 314 F.3d 79, 98 (2d Cir. 2002); *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1116 n.19 (9th Cir. 2002); *In re Paschen*, 296 F.3d 1203, 1209 (11th Cir. 2002); *see also supra* notes 5, 13 and accompanying text; *infra* note 43 and accompanying text.

15. *See, e.g., Neonatology Assocs.*, 293 F.3d at 131; GRESSMAN ET AL., *supra* note 2, at 740; Krislov, *supra* note 1, at 697, 703; Harrington, *supra* note 1, at 673; *see also infra* notes 28-30, 32-33, 38-40 and accompanying text.

16. *See generally* *Voices for Choices*, 339 F.3d 542; *Neonatology Assocs.*, 293 F.3d at 131; Krislov, *supra* note 1, at 703; *infra* notes 38-40 and accompanying text.

and Federal Rule of Appellate Procedure 29 recognize those distinctions and specifically provide for them.¹⁷

Practically all of the empirical data that has been collected, analyzed, and synthesized on amicus involvement relates to the Supreme Court (although a study of filings during 2002 did evaluate amicus participation in the regional circuits), while numerous judges and writers have observed that appeals courts freely grant amici leave to file briefs.¹⁸ The survey conducted in 2002 ascertained that appellate court amicus involvement was significantly less pervasive than before the Supreme Court: amici tendered 635 briefs in 413 out of approximately 5000 reported appellate cases.¹⁹ The study asserted that amicus submissions appeared to impose a much "greater burden on the Supreme Court," while amicus briefs filed with the regional circuits were "not increasing at a rate that would cause a substantial burden in the near future . . . [and were] actually becoming a smaller portion of" the appellate courts' growing responsibilities, which could be attributed to docket expansion.²⁰

In short, the Supreme Court generously addresses amicus curiae requests to participate and experiences amicus involvement in a high percentage of cases. Most of the regional circuits similarly treat amicus motions, although the tribunals encounter significantly less frequent amicus participation, and relatively few tribunals have elaborated their jurisprudence through published opinions. The next section, accordingly, evaluates how the appellate courts resolve amicus requests.

III. MODERN APPELLATE COURT RESOLUTION OF AMICUS MOTIONS

A majority of the twelve federal appeals courts has not sys-

17. SUP. CT. R. 37; FED. R. APP. P. 29; *see also supra* notes 2, 8-11 and accompanying text.

18. *See* Harrington, *supra* note 1, at 670, 676-78; *see also supra* note 11 and accompanying text; *infra* notes 36, 49-50 and accompanying text. *But see infra* note 33.

19. Harrington, *supra* note 1, at 678-88; *see also* ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE U.S. COURTS 39, Supp. tbl. S-3 (2002), available at <http://www.uscourts.gov/judbus2002/contents.html> (click on the link for Table S-3). A 2007 survey of appellate court judges yielded similar conclusions. *See* Simard, *supra* note 1, at 686-87.

20. Harrington, *supra* note 1, at 679-80; *see also Neonatology Assocs.*, 293 F.3d at 133; *infra* note 48 and accompanying text. *But see Voices for Choices*, 339 F.3d at 544; *infra* note 25 and accompanying text.

tematically enunciated criteria for addressing amicus curiae motions to participate or applied standards that the regional circuits have articulated. However, a few appellate courts, most notably the Seventh and Third Circuits, have formulated more comprehensive approaches, and their jurisprudence warrants emphasis in this section. The restrictive Seventh Circuit treatment is evaluated first because it most thoroughly, expressly, and clearly enunciates and enforces the relevant standards. However, the flexible Third Circuit approach seems preferable, as its articulation and application of the pertinent criteria facilitate greater amici involvement.

A. Seventh Circuit

Seventh Circuit Judge Richard Posner has authored three opinions for the appeals court that comprehensively formulate the standards for resolving amicus curiae motions and how the tribunal should enforce the criteria as well as the justifications for enunciating restrictive standards that jurists stringently applied. The *Voices for Choices v. Illinois Bell Telephone Company*²¹ determination warrants emphasis because it is more recent than the *National Organization for Women, Inc. v. Scheidler*²² and *Ryan v. Commodity Futures Trading Commission*²³ decisions and incorporates virtually all of the guidance that the earlier opinions provided.

Judge Posner first instructed that allowing an amicus to submit a brief “is a matter of ‘judicial grace’” and that Seventh Circuit judges have not granted “rote permission to file such a brief, and in particular they will deny permission to file an amicus brief that essentially duplicates a party’s brief.”²⁴ The jurist then espoused several reasons for the appellate court’s policies:

[J]udges have heavy caseloads and therefore need to minimize extraneous reading; amicus briefs, often solicited by parties, may be used to make an end run around court-imposed limitations on the length of par-

21. 339 F.3d 542 (7th Cir. 2003).

22. 223 F.3d 615 (7th Cir. 2000).

23. 125 F.3d 1062 (7th Cir. 1997). Judge Posner wrote *Voices for Choices* and *Ryan* in chambers, while he authored *Scheidler* for a three judge panel.

24. *Voices for Choices*, 339 F.3d at 544 (citing *Scheidler*, 223 F.3d at 617).

ties' briefs; the time and other resources required for the preparation and study of, and response to, amicus briefs drive up the cost of litigation; and the filing of an amicus brief is often an attempt to inject interest group politics into the federal appeals process.²⁵

Judge Posner next stated that "the criterion for deciding whether to permit the filing of an amicus brief should be . . . whether the brief will assist the judges by presenting ideas, arguments, theories, insights, facts, or data that are not to be found in the parties' briefs."²⁶ The jurist elaborated by observing that the standard will more likely be satisfied in:

case[s] in which a party is inadequately represented; or in which the would-be amicus has a direct interest in another case that may be materially affected by a decision in this case; or in which the amicus has a unique perspective or specific information that can assist the court beyond what the parties can provide.²⁷

Judge Posner then remarked that in his two-decade experience on the federal appellate bench it was "very rare for an amicus curiae brief to do more than repeat in somewhat different language the arguments in the brief of the party whom the amicus is supporting."²⁸

When Judge Posner applied the guidance that he enunciated to the briefs which amici proffered, the jurist determined that the papers included "a few additional citations not found in the parties' briefs and slightly more analysis on some points, [but] essentially they cover the same ground [as] the appel-

25. *Voices for Choices*, 339 F.3d at 544 (citing *Scheidler*, 223 F.3d at 616); accord *Jaffee v. Redmond*, 518 U.S. 1, 35-36 (1996) (Scalia, J., dissenting) (regarding the injection of interest group politics). See also *Craig v. Harney*, 331 U.S. 367, 397 (1947); *supra* note 6. But see *infra* notes 48, 56-66 and accompanying text.

26. *Voices for Choices*, 339 F.3d at 545; see also 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, 815-16 (2004); Michael Rustad & Thomas Koenig, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs*, 72 N.C. L. REV. 91, 94 (1993); *infra* notes 58-62 and accompanying text.

27. *Voices for Choices*, 339 F.3d at 545 (citing *Scheidler*, 223 F.3d at 616-17; *Ryan*, 125 F.3d at 1063); accord *Am. Coll. of Obstetricians & Gynecologists v. Thornburgh*, 699 F.2d 644, 645 (3d Cir. 1983) (regarding inadequate representation). But see *infra* notes 38-43, 60-61 and accompanying text.

28. *Voices for Choices*, 339 F.3d at 545; see also *infra* note 32 and accompanying text. But see *Al-Marri v. Pucciarelli*, 534 F.3d 213, 221 n.3 (4th Cir. 2008) (Motz, J., concurring in the judgment).

lants, in whose support they wish to file.”²⁹ Judge Posner further instructed that this was not a situation:

in which a party is inadequately represented, or the would-be amici have a direct interest in another case that may be materially affected by a decision in this one, or they are articulating a distinctive perspective or presenting specific information, ideas, arguments, etc. that go beyond what the parties whom the amici are supporting have been able to provide.³⁰

Ryan v. Commodity Futures Trading Commission, the earliest of the three Seventh Circuit determinations, offers additional insights. Judge Posner, denying an amicus motion, explained that there was a tendency on the part of numerous Seventh Circuit members, including himself, to grant motions without carefully evaluating why an amicus brief was desirable, even though Rule 29 requires jurists to undertake this kind of assessment.³¹ Judge Posner asserted that those requests warranted scrutiny “in a more careful, indeed, a fish-eyed, fashion” because after sixteen years of reading them, the jurist determined the vast majority has “not assisted the judges [and] are filed by allies of litigants and duplicate the arguments made in the litigants’ briefs, in effect merely extending the length of the litigant’s brief.”³² The jurist contended that “these briefs should not be allowed. They are an abuse.”³³

B. Third Circuit

The Third Circuit opinion in *Neonatology Associates v. Commissioner of Internal Revenue*³⁴ sharply contrasts with, and es-

29. *Voices for Choices*, 339 F.3d at 545; see also *supra* note 28 and accompanying text; *infra* note 32 and accompanying text.

30. *Voices for Choices*, 339 F.3d at 545; see also *supra* note 27 and accompanying text.

31. See *Ryan*, 125 F.3d at 1063; see also *supra* notes 9-11 and accompanying text; *infra* note 57 and accompanying text.

32. *Ryan*, 125 F.3d at 1063; see also *supra* note 28 and accompanying text.

33. *Ryan*, 125 F.3d at 1063. 16A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3975 (3d ed. Supp. 2008) finds little evidence that jurists outside the Seventh Circuit share Judge Posner’s views and freely grant amici motions, and that *Thornburgh* is the last published opinion denying a motion. For additional analysis of the Seventh Circuit jurisprudence, see Garcia, *supra* note 1; Harrington, *supra* note 1; see also *infra* notes 36-37, 41-43 and accompanying text.

34. 293 F.3d 128 (3d Cir. 2002).

sententially rejects, the line of Seventh Circuit precedent that restrictively treats amicus participation. However, Judge Samuel Alito wrote that decision before Judge Posner published the *Voices for Choices* opinion. The Third Circuit jurist did subscribe to a few ideas championed by Judge Posner in *Voices for Choices* or the two earlier determinations.

The appellants in the *Neonatology Associates* case contended that amici did not satisfy the requirements that the movants be impartial and support unrepresented or inadequately represented parties, which Rule 29 purportedly imposed.³⁵ Judge Alito observed that the appellants premised their arguments on a “small body of judicial opinions that look with disfavor on” amicus briefs, including two Seventh Circuit decisions, but the appellants claimed that the “restrictive standards espoused in these opinions represent the views of ‘the judiciary’ and are ‘settled law’ ‘in this jurisdiction.’”³⁶ The jurist rejected appellants’ contentions, suggested that the strict interpretation was not Third Circuit law, decided that a broader construction was appropriate, and held that amici satisfied the strictures in Rule 29.³⁷

Judge Alito first ascertained that appellants’ insistence that amicus be impartial “was once accurate and still appears in certain sources [but] . . . became outdated long ago[.]” while the perspective was “difficult to square with . . . Rule 29’s ‘interest’ requirement, [that] weighs strongly against the appellants’ argument.”³⁸ The jurist concomitantly determined that

35. See *id.* at 130-32; see also *supra* notes 27, 30 and accompanying text; *infra* notes 59-60 and accompanying text.

36. *Neonatology Assocs.*, 293 F.3d at 130 (citing *Nat'l Org. for Women, Inc. v. Scheidler*, 223 F.3d 615 (7th Cir. 2000); *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062 (7th Cir. 1997)); see also *supra* notes 18, 33 and accompanying text.

37. See *Neonatology Assocs.*, 293 F.3d at 130-33.

38. *Id.* at 131 (citations omitted). The jurist found it “particularly difficult to reconcile impartiality and interestedness if the latter requirement is interpreted as a panel of our court did in [*Thornburgh*].” *Id.* *Thornburgh* denied an amicus motion “because the proposed amici, a group of law professors, ‘d[id] not purport to represent any individual or organization with a legally cognizable interest in the subject matter at issue, and [gave] only their concern about the manner in which this court will interpret the law.’” *Id.* (citing *Am. Coll. of Obstetricians & Gynecologists v. Thornburgh*, 699 F.2d at 644, 645 (3d. Cir. 1983)) (emphasis added). He found it “would be virtually impossible for an amicus to show that it is ‘an impartial individual . . . whose function is to advise in order that justice may be done’ but not a person who is ‘only . . . concern[ed] about the manner in which [the] court will interpret the law.’” *Neonatology Assocs.*, 293 F.3d at 131. The *Thornburgh* majority seemed to assimilate improperly Rule 29 to civil rule 24’s intervention of right strictures, as the dissent recognized by stating, “amici have

the appellants' suggestion that the phrase *amicus curiae* indicates some impartiality was "contrary to the fundamental assumption of our adversary system that strong (but fair) advocacy on behalf of opposing views promotes sound decision making."³⁹ He concluded that "[t]he argument that an amicus cannot be a person who has a 'pecuniary interest in the outcome' also flies in the face of current appellate practice."⁴⁰

Judge Alito similarly registered disagreement with the contention that amici must show the party supported is inadequately represented or unrepresented.⁴¹ The jurist observed that "Rule 29 does not contain any such provision, [so to be] valid it must represent an 'elaboration' on the [provision's] 'desirability' [stricture]."⁴² However, in Judge Alito's view, that requirement was "most undesirable" because "an amicus may provide important assistance to the court," even when parties are well represented, recounting several cogent examples.⁴³

The jurist then characterized the desirability criterion in Rule 29 as open-ended and argued that "a broad reading is prudent."⁴⁴ Because the judges who must resolve an amicus motion at an appeal's rather nascent stage experience difficulty ascertaining the value of a brief and may not ultimately decide the case, the jurist found it "preferable to err on the side of granting leave."⁴⁵

not filed a motion to intervene as a party" but sought to share their views on a critical constitutional issue, as had many amici. *Thorburgh*, 699 F.2d at 646-47 (Higginbotham, J., dissenting) (emphasis omitted). Judge Alito intimated that he favored the dissent's view. See *Neonatology Assocs.*, 293 F.3d at 131.

39. *Neonatology Assocs.*, 293 F.3d at 131; see also *supra* notes 26-27 and accompanying text.

40. *Neonatology Assocs.*, 293 F.3d at 131. "A quick look at Supreme Court opinions discloses that . . . parties with 'pecuniary' interests appear regularly as amici," while some cases with the most amici "illustrate this point." *Id.* at 131-32; see also GRESSMAN ET AL., *supra* note 2, at 740; *supra* notes 9-10 and accompanying text; *infra* notes 55-56 and accompanying text.

41. See *Neonatology Assocs.*, 293 F.3d at 132; see also *infra* notes 59-60 and accompanying text. But see *supra* notes 27, 30 and accompanying text.

42. *Neonatology Assocs.*, 293 F.3d at 132.

43. *Id.* (citing Luther T. Munford, *When Does the Curiae Need An Amicus?*, 1 J. APP. PRAC. & PROCESS 279 (1999)) ("Some amicus briefs collect background or factual references that merit judicial notice [or] . . . are entities with particular expertise not possessed by any party to the case. Others argue points deemed too far-reaching for emphasis by a party intent on winning a particular case. Still others explain the impact a potential holding might have on an industry or other group."); see also *supra* notes 9, 11 and accompanying text; *infra* notes 57-58 and accompanying text.

44. *Neonatology Assocs.*, 293 F.3d at 132.

45. See *id.* at 132-33. Judge Alito added that a merits panel can easily detect an unhelpful

Judge Alito next enunciated several contentions against a restrictive policy for addressing amici motions. First, the jurist observed that a restrictive approach might “create at least the perception of viewpoint discrimination.”⁴⁶ Second, the judge found this practice “may also convey an unfortunate message about” the court’s openness.⁴⁷ Third, the jurist believed that a restrictive policy was an “unpromising strategy for lightening a court’s work load” because skeptical scrutiny in the motions phase may be as time-consuming as evaluation at the merits stage, and “unhelpful amicus briefs surely do not claim more than a very small part of a court’s time.”⁴⁸

For all of the reasons examined above, Judge Alito asserted that the Third Circuit “would be well advised to grant motions for leave to file amicus briefs unless it is obvious that the proposed briefs do not meet Rule 29’s criteria as broadly interpreted.”⁴⁹ The jurist thought this approach comported “with the predominant practice in the courts of appeals.”⁵⁰ Judge Alito concluded by applying the law he had articulated to the facts and determined that amici had satisfied the interest, relevance, and desirability constituents in the rule.⁵¹

C. Additional Cases

The Seventh and Third Circuits are the only appellate courts that have specifically and thoroughly addressed Rule 29’s standards for deciding amicus motions. However, a few re-

brief and simply disregard it but admonished that a good brief’s rejection means the panel “will be deprived of a resource.” *Id.* at 133.

46. *Id.* at 133 (“Unless a court follows a policy of either granting or denying motions for leave to file in virtually all cases, instances of seemingly disparate treatment are predictable.”).

47. *Id.* For views that agree with this idea and those cited *supra* in note 46 and accompanying text, see *Boumediene v. Bush*, 476 F.3d 934, 936 (D.C. Cir. 2006); see also *infra* notes 73-74 and accompanying text.

48. *Neonatology Assocs.*, 293 F.3d at 133; see also *supra* note 45 and accompanying text; *infra* note 73 and accompanying text. *But see supra* note 25 and accompanying text.

49. See *Neonatology Assocs.*, 293 F.3d at 133; see also *supra* note 44 and accompanying text.

50. See *Neonatology Assocs.*, 293 F.3d at 133 (citing MICHAEL E. TIGAR AND JANE B. TIGAR, FEDERAL APPEALS—JURISDICTION AND PRACTICE 181 (3d ed. 1999); ROBERT L. STERN, APPELLATE PRACTICE IN THE UNITED STATES 307-08 (2d ed. 1989)); accord *Am. Coll. of Obstetricians & Gynecologists v. Thornburgh*, 699 F.2d 644, 646-47 (3d Cir. 1983) (Higginbotham, J., dissenting); *supra* note 11 and accompanying text.

51. See *Neonatology Assocs.*, 293 F.3d at 133; see also *supra* notes 9-11 and accompanying text. For additional analysis of the Third Circuit jurisprudence, see Garcia, *supra* note 1; Harrington, *supra* note 1.

gional circuits have touched on the issues that the Seventh and Third Circuits have squarely treated. For example, in the context of addressing an attorney's fees request for preparing an amicus brief, the Eleventh Circuit invoked *Voices for Choices* for the notion that parties frequently solicit amicus briefs as a means to avoid court-imposed page limitations.⁵² The Eleventh Circuit denied the attorney's fees request and condemned this idea, declaring that compensating a non-party organization or group for the "work would encourage the practice, which we are loathe to do."⁵³ Numerous district courts have also relied on the Seventh and Third Circuit determinations to resolve amicus motions, although these opinions minimally elaborate the appellate precedent and are beyond this Article's scope.⁵⁴

In sum, the overwhelming majority of regional circuits has not enunciated a comprehensive jurisprudence for resolving amicus curiae motions in published opinions, while the standards that the appeals courts use and their application vary and remain unclear. Moreover, the two appellate courts that have articulated the most fully-developed jurisprudence provide somewhat less clarity than they might and are in tension. For example, the Seventh Circuit has thoroughly and clearly enunciated the criteria for resolving amicus motions but has enforced them too restrictively, while the Third Circuit has articulated the standards with insufficient specificity and clarity even as the court has applied the criteria using the appropriate degree of flexibility. Thus, the last portion affords recommendations for future treatment of amicus motions by selectively extracting and carefully meshing the best aspects of the Supreme Court as well as the Seventh and Third Circuit jurisprudence.

52. *Glassroth v. Moore*, 347 F.3d 916, 919 (11th Cir. 2003) (citing *Voices for Choices v. Ill. Bell Tel. Co.*, 339 F.3d 542, 544 (7th Cir. 2003)); see also *Garcia*, *supra* note 1, at 328. See generally *supra* notes 25, 28-30, 32-33 and accompanying text.

53. *Glassroth*, 347 F.3d at 919; see *Harrington supra* note 1, at 672. *Boumediene v. Bush*, 476 F.3d 934, 936 (D.C. Cir. 2006); *Eldred v. Reno*, 239 F.3d 372 (D.C. Cir. 2001), *aff'd on other grounds sub nom. Eldred v. Ashcroft*, 537 U.S. 186 (2003); and *Eldred v. Ashcroft*, 255 F.3d 849 (D.C. Cir. 2001) treat the importance of amici and their participation's breadth, but do not directly address the criteria. For recent controversies involving Supreme Court and D.C. Circuit amici, see *Garcia*, *supra* note 1, at 330-31.

54. See, e.g., *Cobell v. Norton*, 246 F. Supp. 2d 59 (D.D.C. 2003); *Long v. Coast Resorts, Inc.*, 49 F. Supp. 2d 1177 (D. Nev. 1999); *U.S. v. Alkaabi*, 223 F. Supp. 2d 583 (D.N.J. 2002); see also *Garcia*, *supra* note 1, at 329-30; *Harrington*, *supra* note 1, at 671.

IV. SUGGESTIONS FOR THE FUTURE

A. *Suggestions*

All twelve regional circuits must enunciate as thoroughly and clearly as possible the criteria for resolving amicus curiae motions, while the appeals courts should generously enforce the standards to facilitate efficacious amicus involvement. The regional circuits must define and elaborate the criteria that govern requests to participate and flexibly apply them in published opinions. If these case-specific efforts prove insufficient, the United States Judicial Conference Advisory Committee on Appellate Rules may want to consider the amendment of Federal Rule of Appellate Procedure 29, while the twelve individual appellate courts might wish to assess revision of that command's local analogues.

More particularly, the regional circuits should articulate comprehensive and lucid definitions of Rule 29's interest, desirability and relevance strictures. The interest concept appears less important and seems designed in part to deter litigants from recruiting amici that will facilitate their avoidance of page-limitation mandates.⁵⁵ The interest language might concomitantly be seen as a vehicle for guaranteeing amicus commitment to litigation of the issues at stake by analogy to Federal Rule of Civil Procedure 24's interest prong for intervention of right or to the standing doctrine. However, this approach may improperly conflate appellate Rule 29 and civil rule 24 by effectively assimilating the idea of amicus, which does *not* confer party status, to the concept of intervenor, which does. That view apparently contravenes the Rule 29 drafters' intent.⁵⁶

The desirability and relevance requirements in Rule 29 seem analogous. Moreover, the Advisory Committee Note, which accompanied the rule's 1998 amendment, instructed that the language was inserted to mirror wording in Supreme Court Rule 37(1), as the relevance of the input that an amicus proffers is typically the most critical reason for granting a motion.⁵⁷

55. See *supra* notes 9-10, 16-17, 25, 27, 52-53 and accompanying text.

56. See *supra* notes 8-9 and accompanying text; see also *supra* notes 28, 38-43 and accompanying text.

57. FED. R. APP. P. 29, 1998 advisory committee's note; see also *supra* notes 2, 7, 11 and ac-

Indeed, desirability appears to lack much independent meaning because an amicus contribution that is relevant should usually be desirable.

Regardless of whether desirability and relevance have discrete applicability, Judge Posner seemed to distill their essence when he stated that the criterion for allowing amicus participation is “whether the brief will assist the judges by presenting ideas, arguments, theories, insights, facts or data that are not to be found in the parties’ briefs.”⁵⁸ Less helpful is Judge Posner’s elaboration of circumstances in which the standard more likely will be satisfied: a party is inadequately represented or the putative amicus possesses a “direct interest in another case” that the instant appeal’s resolution could materially affect or offers a unique viewpoint or particular material which may aid the court.⁵⁹ The inadequate representation concept is not as valuable for the reasons that Judge Alito trenchantly explained;⁶⁰ the direct interest notion is less useful because of the concepts mentioned immediately above,⁶¹ and the unique perspective or specific information that can assist the court ideas are not so helpful, as they effectively reiterate the criterion.⁶² In short, the fundamental question is whether the amicus could make a contribution that promises to improve the quality of judicial decision-making by supplying input that the parties have not afforded.

The twelve regional circuits should flexibly apply the criteria for permitting amicus participation. Thus, when the issue of whether a particular amicus has satisfied Rule 29’s requirements is unclear or presents a close question, judges should broadly read the proviso and “err on the side of granting leave.”⁶³ Judges should also canvass and apply measures that will be responsive to the concerns, namely resource costs im-

companying text.

58. See *supra* notes 26, 30, and accompanying text. Thus, an amicus brief that reiterates the ideas that a party’s brief includes would not satisfy Rule 29. See *supra* notes 2, 11 and accompanying text. Other judges articulate similar notions. See sources cited *supra* notes 5, 14, and 39.

59. See *supra* notes 27, 30 and accompanying text.

60. See *supra* notes 41-43 and accompanying text.

61. See *supra* notes 55-56 and accompanying text.

62. See *supra* note 58 and accompanying text.

63. *Neonatology Assocs.v. Comm’r*, 293 F.3d 128, 132-33 (3d Cir. 2002); see *supra* notes 44-45, 49 and accompanying text.

posed on jurists and parties, especially by redundant amicus input, and efforts to avoid page limitations, which Judge Posner has articulated.⁶⁴ Techniques, such as further narrowing page restrictions, may save court and litigant expense, while judges have generally been able to identify end-runs around these limitations, partly by consulting amici submissions that ostensibly satisfy the interest requirement, and to detect repetitive amici contributions.⁶⁵ However, jurists should accord relatively little weight to Judge Posner's concern that amici will inject interest group politics into the appellate process because many amici do so now, and this may essentially be intrinsic to their participation or to numerous controversial issues, such as questions involving abortion, religion, and terrorism, which litigants request that appeals courts resolve.⁶⁶ Moreover, jurists should always remember that they might simply choose to forego reliance on amicus input that lacks persuasiveness or reiterates party contributions.

The case-by-case treatment suggested above could prove deficient. For example, it may foster conflicting interpretations among the circuits, require too many resources, or not work because of Rule 29's phrasing or judicial resistance to the approach. If this occurs, the Appellate Rules Advisory Committee might consider amending the proviso, while the regional circuits may want to alter their corresponding local rules.⁶⁷ For instance, the Advisory Committee might elide the desirability and relevance ideas and specifically define and elaborate the notion by using concepts that implicate enhanced judicial decision-making, such as the introduction of new legal arguments or factual data, which the Seventh Circuit has pro-

64. See *supra* notes 25, 28-30, 32-33 and accompanying text; see also *supra* note 55 and accompanying text.

65. See *supra* notes 55-56 and accompanying text; see also *supra* notes 25, 28-30, 32-33 and accompanying text. For other techniques, see *infra* note 70. An amicus brief may not exceed "one-half the maximum length authorized . . . for a party's principal brief." FED. R. APP. P. 29(d).

66. See *supra* note 25 and accompanying text; see also Garcia, *supra* note 1, at 331-33; *supra* note 38.

67. Judges have not mentioned these ideas in opinions addressing amici motions. The Advisory Committee and analogous circuit rules committees study the rules and formulate suggestions for improvement. See 28 U.S.C. §§ 2071-75, 2077 (2000); Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 *passim* (1982); Carl Tobias, *Improving the 1988 and 1990 Judicial Improvements Acts*, 46 STAN. L. REV. 1589, 1591-98 (1994).

pounded.⁶⁸ The appellate courts may follow this approach or revise their local rules to include features that some tribunals have prescribed.⁶⁹ Illustrative is the Ninth Circuit, which admonishes that filing multiple amici “briefs raising the same points in support of one party is disfavored,” while it encourages “[a]mici who wish to join in the arguments or factual statements of a party or other amici . . . to file and serve on all parties a short letter so stating.”⁷⁰

B. Justifications

Numerous reasons support these suggestions. Several process values appear most important to the prescription for generous resolution of amicus motions.⁷¹ The idea that amicus participation can improve judicial decision-making by, for example, introducing new legal theories or contentions or different statutory interpretations, supplying additional factual information, or affording novel, convincing public policy arguments, is critical.⁷² Numerous additional practical and policy reasons, which Judge Alito enunciated against restrictive application of the Rule 29 criteria, support the proposal that jurists flexibly apply the standards. These include the difficulties entailed in motions panels’ efforts to ascertain the contributions that amici will make, and the concomitant notion that a restrictive policy is an unpromising strategy to reduce judicial workloads as well as avoiding the perceptions of

68. See *supra* notes 26, 57-58 and accompanying text; see also *supra* notes 9-11, 39 and accompanying text.

69. See, e.g., D.C. CIR. LOCAL R. 29(a); 5TH CIR. LOCAL R. 29.2; see also *Am. Coll. of Obstetricians & Gynecologists v. Thornburgh*, 699 F.2d 644, 646 n.2 (Higginbotham, J., dissenting) (3d Cir. 1983); *Garcia*, *supra* note 1, at 322-23. Seven regional circuits have prescribed no local analogue.

70. See 9TH CIR. LOCAL R. 29-1, advisory committee’s note. The committee and the circuits may even want to consider more fundamental reform to amicus motions, such as applying Federal Rule of Civil Procedure 11’s strictures (especially its requirement for certifying submissions’ propriety) or Federal Rule of Civil Procedure 26’s strictures (especially its requirement for expert witness reports). See *Garcia*, *supra* note 1, at 349-52 (Rule 11 idea); *Simard*, *supra* note 1, at 709 (Rule 26 idea). See generally Keith Beyler, *Expert Testimony Disclosure Under Federal Rule 26: A Proposed Amendment*, 41 J. MARSHALL L. REV. 117 (2007); Carl Tobias, *The 1993 Revision of Federal Rule 11*, 70 IND. L. J. 171 (1994).

71. See Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270 (1989). See generally Stephen B. Burbank, *The Costs of Complexity*, 85 MICH. L. REV. 1463, 1466-71 (1987) (reviewing RICHARD L. MARCUS & EDWARD F. SHERMAN, *COMPLEX LITIGATION: CASES AND MATERIALS ON ADVANCED CIVIL PROCEDURE* (2d ed. 1985)).

72. See, e.g., *supra* notes 26, 39, 58 and accompanying text.

viewpoint discrimination and that courts are not open to the public.⁷³ Amicus involvement may also enhance court transparency, judicial accountability, and the legitimacy and public acceptability of appellate substantive determinations regarding controversial questions.⁷⁴ Promoting access to courts as well may foster important first amendment values, such as freedom of speech and the right to petition.⁷⁵

The appellate courts should thoroughly articulate the relevant criteria and generously apply them in published opinions. Those endeavors will best facilitate lawyer and party access to pertinent requirements, their interpretation and application, as well as compliance with those strictures, while promoting input that enhances judicial decision-making. If this proves infeasible, or if Federal Rule of Appellate Procedure 29 or its local counterparts warrant amendment, the Advisory Committee or the regional circuits should institute these revisions to foster public access and improve the courts' substantive determinations.

V. CONCLUSION

Surprisingly few of the twelve regional circuits have articulated comprehensive standards for resolving motions to file amicus briefs in published opinions. The appellate courts should thoroughly develop criteria and flexibly enforce the standards by drawing on the jurisprudence that the Supreme Court as well as the Seventh and Third Circuits have enunciated because these actions will facilitate amicus input that enhances judicial decision-making.

73. See *supra* notes 45-48 and accompanying text.

74. See Burbank, *supra* note 71, at 1466-71; see also Carl Tobias, *Fourth Circuit Publication Practices*, 62 WASH. & LEE L. REV. 1733, 1753 (2005).

75. See Garcia, *supra* note 1, at 319-20. *But see supra* notes 25, 66 and accompanying text.