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FRENEMIES OF THE COURT: THE MANY FACES OF AMICUS CURIAE

Helen A. Anderson *

INTRODUCTION

Ask any lawyer what an “amicus curiae” is, and you will be told that the term means “friend of the court.”¹ The term has positive, even warm, connotations. Amicus briefs provide additional information or perspectives to assist courts in deciding issues of public importance. Interest groups, law professors, and politically engaged lawyers are happy to participate in important cases through such briefs. Amicus curiae participation is defended as democratic input into what is otherwise not a democratic branch of government.²

Yet, amici curiae—nonparties who are nevertheless advocates, who are not bound by rules of standing and justiciability, or even rules of evidence, and who can present the court with new information and arguments—occupy a unique place in the appellate

* Professor of Law, University of Washington School of Law. The author wishes to thank her colleagues at the University of Washington School of Law who attended a presentation of this article, and especially Thomas Cobb, Lisa Manheim, Kate O'Neill, Kathy McGinnis, Zahr Said, and David Ziff for their excellent suggestions. Elizabeth Porter read a draft and provided much expertise and encouragement. The author also wishes to thank the participants at the West Coast Rhetoric Workshop at the William S. Boyd School of Law (2012), and, in particular, Linda Edwards and Jeanne Moreno for their helpful comments on an earlier draft.

1. See BLACK'S LAW DICTIONARY 98 (9th ed. 2009) (defining “amicus curiae” and also noting “friend of the court” as an alternative term).

2. See, e.g., Ruben J. Garcia, *A Democratic Theory of Amicus Advocacy*, 35 FLA. ST. U. L. REV. 315, 319–20 (2008); Ryan Salzman, Christopher J. Williams & Bryan T. Calvin, *The Determinants of the Number of Amicus Briefs Filed Before the U.S. Supreme Court, 1953–2001*, 32 JUST. SYS. J. 293, 294–95 (2011); Omari Scott Simmons, *Picking Friends from the Crowd: Amicus Participation as Political Symbolism*, 42 CONN. L. REV. 185, 190 (2009).

courts.³ Amicus briefs have the potential to exert significant influence on a decision, despite their “delusive innocuousness.”⁴

Amicus curiae participation has surged in recent years, primarily by interest and advocacy groups wishing to advance their law reform efforts and to gain publicity.⁵ In addition, government agencies, officials, law professors, law clinics, individual lawyers, and even high school students have all added their arguments to those of the litigating parties.⁶ Yet the category of amicus curiae remains largely unexamined, and little attention is paid to the very different roles amici can play. In some ways, the very term amicus—friend—has obscured the full effect of these changes.⁷

This article creates a taxonomy of amici curiae that allows for a clearer analysis of the advantages and potential drawbacks of amicus participation. Rather than categorizing amici curiae by the types of arguments made, as some scholars have done, this taxonomy categorizes amici by their relationships to the court and the parties.⁸ This article also looks beyond the Supreme

3. See Linda Sandstrom Simard, *An Empirical Study of Amici Curiae in Federal Court: A Fine Balance of Access, Efficiency and Adversarialism*, 27 REV. LITIG. 669, 675 (2008).

4. Samuel Krislov, *The Amicus Brief: From Friendship to Advocacy*, 72 YALE L.J. 694, 694 (1963) (referencing “delusive innocuous” in the context of the amicus briefs’ “seemingly static function and . . . offhand manner of . . . use in court”).

5. See 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, 810–11, 825–26 (2004).

6. See Patricia Montemurri, *Ann Arbor Teen’s Legal Brief: Juvenile Lifers Deserve a 2nd Chance*, DETROIT FREE PRESS (Feb. 17, 2014, 11:11 AM), <http://www.freep.com/article/20140217/NEWS06/302170018/Juvenile-Lifer-Catholic-Ann-Arbor-student-brief> (describing a high school student’s amicus brief to the Supreme Court of Michigan). See generally Tony Mauro, *Bench Pressed*, AM. LAW., Mar. 2005, at 85 (discussing the surge in amicus briefs in the Supreme Court of the United States).

7. Would courts be so welcoming to amicus curiae of every stripe if we called most of them, as the Canadians do, “interveners?” Canadian courts use the term “amicus curiae” to mean someone who has been asked by the court to provide a viewpoint which the court believes is necessary. See John Koch, *Making Room: New Directions in Third Party Intervention*, 48 U. TORONTO FAC. L. REV. 151, 157 & n.26 (1990). In Canada, the term “intervener” means someone who has asked to file a brief. See Rules of the Supreme Court of Canada, Rules 55–59, SOR/2002-156 (Can. 2014) (listing the requirements for intervening in Canada). Groups or persons seeking to intervene must show their interest in the litigation and that their submission will be “useful and different” from the other submissions in the case. Edward Clark, *The Needs of the Many and the Needs of the Few: A New System of Public Interest Intervention for New Zealand*, 36 VICT. U. WELLINGTON L. REV. 71, 84 (2005) (describing the Canadian system and arguing for a similar system in New Zealand).

8. See, e.g., Simmons, *supra* note 2, at 203–09 (analyzing amicus curiae participation in terms of its function and role in argument rather than its relationship to the court); see also Nancy Bage Sorenson, Comment, *The Ethical Implications of Amicus Briefs: A Proposal for Reforming Rule 11 of the Texas Rules of Appellate Procedure*, 30 ST. MARY’S L.J.

Court of the United States—the focus of most scholarly writing on *amicus curiae*—and examines *amicus* practice in all appellate courts.

When *amici curiae* are considered in light of their relationship to the court and the disputants, five major types emerge.⁹ These include lawyers appointed to argue a particular issue, groups or persons invited by the court to provide their perspective, those who advocate for one side of the dispute, those who support neither party, and those who just missed qualifying as intervenors yet have a stake in the outcome. These types can be called the “Court’s Lawyer,” the “Invited Friend,” the “Friend of a Party,” the “Independent Friend,” and the “Near Intervenor.” Of these types, the Friend of a Party category of *amicus curiae* has grown most numerous in recent decades. In addition, federal, state, and local governments—especially the attorneys or solicitors general—enjoy favored *amicus* status in appellate courts, even as they may participate in the ways outlined above.¹⁰ All of these roles do not sit comfortably together in one category. Yet, until now, the differences in *amicus curiae* participation have remained largely unexamined.

The failure to recognize the different roles has led to occasional frustration and incoherent analysis, primarily around the question of “interest.” A myth persists that *amicus curiae* should be disinterested; that its only duty should be to assist the court—as the name “friend of the court” implies¹¹—even though historically there was no such requirement.¹² Yet of the types of *amici* outlined above, only the Court’s Lawyer can be said not to have any interest of its own. On the one hand, courts recognize this reality;

1219, 1245 (1999) (discussing the four basic functions of *amicus* briefs in Texas).

9. See *infra* Part II for a detailed discussion of each *amicus curiae* type.

10. See Simmons, *supra* note 2, at 210–14.

11. See, e.g., ARIZ. R. CIV. APP. P. 16, cmt. (“[A]micus curiae should keep in mind the purpose of an *amicus* brief. As the name implies, an *amicus curiae* brief should assist the Court, not advocate a particular litigant’s case.”). See *infra* Part IV.A.

12. See e.g., *Funbus Systems, Inc., v. Cal. Pub. Util. Comm’n*, 801 F.2d 1120, 1125 (9th Cir. 1986) (“Moreover, we have stated that there is no rule that *amici* must be totally disinterested.”); *Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982) (“There is no rule, however, that *amici* be totally disinterested.”); see also Krislov, *supra* note 4, at 703–04 (discussing the function, not requirement, of *amicus* briefs in the early 20th century, and discussing the evolution of *amicus curiae* from neutrality to its contemporary role of partisanship); Michael K. Lowman, Comment, *The Litigating Amicus Curiae: When Does the Party Begin After the Friends Leave?* 41 AM. U. L. REV. 1243, 1254 (1992) (noting that when *amicus curiae* participation emerged on the federal level, it was not simply “an impartial judicial servant”).

on the other hand, they sometimes complain that amici curiae do not behave as true friends of the court.

Again, the term amicus—friend—seems to obscure the reality of amicus curiae participation today. The real question is not whether amici should be interested, but what legitimate interests may justify amicus curiae participation. How that question is answered depends in part upon the court's conception of its own role.

The Supreme Court of the United States has helped the cause of amicus curiae considerably with its open door policy for amicus briefs. But beyond the Supreme Court, some lower federal courts and state appellate courts wrestle with the inherent contradictions of amicus participation. Judge Richard Posner of the United States Court of Appeals for the Seventh Circuit is a particularly prominent critic of amicus briefs. He has stated, "The vast majority of amicus curiae briefs 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."¹³ And yet, despite occasional complaints, the role of amici curiae remains barely examined or restrained. In large part this may be because courts have no obligation toward amici: if an amicus brief is not helpful, the court can simply ignore it.¹⁴

Much academic ink has been spilt on the study of amicus curiae in the Supreme Court of the United States. Scholars have chronicled the dramatic rise in amicus participation in the Court,¹⁵ lauded this participation as democratic input that contributes to the Court's legitimacy, and otherwise extolled the Court's welcoming attitude.¹⁶ Political scientists have also attempted to measure the influence of this "rising tide" of amicus briefs.¹⁷ Additionally, academics themselves are regular authors of amicus briefs.¹⁸

13. *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997).

14. See Mauro, *supra* note 6, at 85 (discussing how Supreme Court Justices often skip over many filed amicus briefs).

15. See Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 749 (2000); Krislov, *supra* note 4, at 716.

16. See Garcia, *supra* note 2, at 319–20; Simmons, *supra* note 2, at 199–202.

17. See Kearney & Merrill, *supra* note 15, at 749, 751–52, 789.

18. See, e.g., *Decker v. Nw. Env'tl. Def. Ctr.*, 570 U.S. ___, ___, 133 S. Ct. 1326, 1338 (2013) (Roberts, C.J., concurring) ("Out of 22 amicus briefs, only two—filed by dueling

More recently, critiques of amicus curiae participation have been heard, again focused on the Supreme Court. Some criticize the sheer volume of amicus briefs, some question whether agencies are using amicus briefs to evade rule-making procedures, and some question the Court's use of amicus curiae for factual research or as a way around the adversarial process.¹⁹

But the Supreme Court is unique. Parties are well-represented; even those without means will be represented by very competent volunteers eager for the experience and publicity. The Court generally addresses issues of wide applicability and welcomes the input of certain amici curiae.²⁰

Other courts, however, may not be able to entertain as many friends as the Supreme Court. The federal courts of appeals are high-volume courts and may be more sensitive to an increase in their workload, or what might be perceived as meddling by interest groups.²¹ State courts may have an additional concern: more than half of state high courts are sensitive to democratic pressures through the election of judges.²² As a result, lobbying of state courts through amicus briefs has the potential to politicize

groups of law professors—addressed the issue on the merits.”).

19. See, e.g., Deborah Thompson Eisenberg, *Regulation by Amicus: The Department of Labor's Policy Making in the Courts*, 65 FLA. L. REV. 1223, 1223–31 (2013) (undertaking the investigation of amicus briefs as a means of evading rule-making procedures and its consequent effect on worker protection statutes); Brian P. Goldman, Note, *Should the Supreme Court Stop Inviting Amici Curiae to Defend Abandoned Lower Court Decisions?*, 63 STAN. L. REV. 907, 909–11 (2011) (challenging the Court's alleged interference with the adversarial system through its discretion to appoint amicus curiae); Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 DUKE L.J. 1, 3–5, 7 (2011) (questioning amicus curiae participation as a means for obtaining off-the-record facts which were not tested under adversarial adjudication); Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 VA. L. REV. (forthcoming 2014) (manuscript at 5–7), available at <http://ssrn.com/abstract=2409071> (similarly challenging the introduction of off-the-record facts); Simard, *supra* note 3, at 700 (discussing Justice Ginsburg's belief that the sheer volume of briefs might cause the Court to miss a “gem” fact or argument laid out in one brief).

20. See Kearney & Merrill, *supra* note 15, at 761–62, 764.

21. See, e.g., Gorod, *supra* note 19, at 35–36 (describing increased amicus curiae participation and courts' tendencies to allow amicus briefs to influence their decision-making); John Harrington, Note, *Amici Curiae in the Federal Courts of Appeals: How Friendly Are They?*, 55 CASE W. RES. L. REV. 667, 677 (2005) (“The arguments against broad amicus participation raise concerns about workload problems, increased litigation costs, improper use of the device by parties, and the improper use of courts of appeals to further interest group politics.”).

22. See, e.g., *Fact Sheet on Judicial Selection Methods in the States*, ABA, http://www.americanbar.org/content/dam/aba/migrated/leadership/fact_sheet.authcheckdam.pdf (last visited Nov. 24, 2014) (reporting that fourteen states have elected high court justices, while another seventeen have uncontested retention elections).

state court proceedings in a way that is different than in federal courts with lifetime appointments.

If *amicus curiae* participation grows in lower federal and state courts, these tribunals should clarify the role of *amicus* and consider reasonable limitations. An open door policy can go too far. As one court stated in a different context, "What makes for health as an occasional medicine would be disastrous as a daily diet."²³ The voices of the litigants, as well as basic adversarial principles, can get lost as more and more friends muscle their way into court, eager for influence or the limelight. Courts, especially state and lower federal courts, should exert some restrictions on *amicus curiae* participation.

This article proceeds as follows. Part I summarizes the history of *amicus curiae* in the American courts. Part II describes the different types of *amici curiae*, from governmental *amici* to the Court's Lawyer, Friends of a Party, Independent Friends, and Near Intervenors. Part III examines the minimal constraints on *amicus curiae* and the *amicus* brief itself—its content, page limit, and due date—as well as judicial attitudes towards *amicus curiae*, as revealed in the court rules and occasional written opinions and surveys. Part IV considers whether and how to limit current *amicus curiae* participation. The article concludes that although *amicus* briefs do not seem to be a problem for most courts, there are some reforms to consider. To better assess *amicus* credibility, all courts should consider requiring financial and authorship disclosure, as the Supreme Court of the United States does. Should lower courts become overwhelmed with interest group briefs, they might also consider restrictions on duplicative briefs, or briefs that offer nothing useful for the court. A clearer sense of the different types of *amicus curiae*, and their different contributions or potential for abuse, will help courts address problems that may arise. This may also help some of those who complain that *amici curiae* are not true to the original concept of "friend of the court." In reality, we are long past that definition.

23. *United States v. Dougherty*, 473 F.2d 1113, 1136 (D.C. Cir. 1972) (discussing jury nullification).

I. THE HISTORY OF AMICUS CURIAE

Several articles recount the rise of amicus curiae participation in the Supreme Court of the United States.²⁴ Most begin with a 1963 article by Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*.²⁵ Krislov's article, the thesis of which is clear from the title, describes the early, common law role of amicus curiae as that of the disinterested bystander who offered the court important information or suggestions.²⁶ "Bystander" here is meant literally: a lawyer—though it need not have been a lawyer—on another case who might have been in the court and then offered information or advice. The information might have been about a legal point, an error on the court's part, the death of a party, or the existence of other proceedings. Krislov tells of "one extreme instance," when "Sir George Treby, a member of Parliament, informed the court that he had been present at the passage of the statute whose meaning was contested and, as amicus curiae, wished to inform the court of the intent of Parliament in passing the legislation."²⁷ At common law, the definition of amicus curiae was flexible and rested within the court's discretion.²⁸

But even as amicus curiae were described as disinterested, the amicus role allowed courts to address the shortcomings of the adversarial system by giving voice to other persons potentially affected by the suit.²⁹ An important function of the amicus curiae was to inform the court about collusive suits.³⁰ Third parties who might not have standing, but whose interests were affected, could be heard. Thus, already in early times amicus curiae might not have been so much the court's friend, as the friend of a particular interest or person.

It is worth pausing at this point to consider whether the term "amicus" or "friend" may itself have undergone a change over the centuries. The principal modern definition of friend is "a person

24. See, e.g., Gregory A. Caldeira & John R. Wright, *Amici Curiae Before the Supreme Court: Who Participates, When, and How Much?*, 52 J. POL. 782, 782–84 (1990); Kearney & Merrill, *supra* note 15, at 749; Larsen, *supra* note 19, at 2.

25. Krislov, *supra* note 4.

26. See *id.* at 695.

27. *Id.*

28. *Id.*

29. *Id.* at 703–04.

30. *Id.* at 696.

whom one knows, likes, and trusts.”³¹ In Samuel Johnson’s 1755 dictionary, the first entry for “friend” is similar to today’s meaning: “One joined to another in mutual benevolence and intimacy: opposed to foe or enemy.”³² But Johnson mentioned other uses of the term: “One without hostile intentions” and “A familiar compellation: Friend, how camest thou in hither?”³³ These more expansive meanings survive in the formal terms of address in British (and Canadian) courts and government, such as “my learned friend.”³⁴ Thus, an *amicus curiae* probably did not mean one joined in intimacy and mutual benevolence with the court, but more likely meant something closer to “not hostile” or “respectable colleague.” Yet, the warm connotations of friendship linger with the term.

In the early days of the United States, *amicus curiae* began to take on another role: that of representing the public—or governmental—interest in private disputes.³⁵ Krislov believed that “[t]he creation of a complex federal system meant not only that state and national interests were potentially in conflict, but also that an even greater number of conflicting public interests were potentially unrepresented in the course of private suits.”³⁶ The Supreme Court broadened the role of *amicus curiae*, so that the state and federal governments could be heard on matters that implicated their interests.³⁷ The first appearance of an *amicus curiae* for a state interest was that of Henry Clay on behalf of the

31. *Friend*, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 2011), available at <http://search.credoreference.com/content/entry/hmdictenglant/friend/0?searchId=add1f8be-4e40-11e4-8e03-0aeale24c1ac&result=0> (using the search term “friend”). Other definitions include: “2. A person whom one knows; an acquaintance. 3. A person with whom one is allied in a struggle or cause; a comrade. 4. One who supports, sympathizes with, or patronizes a group, cause or movement: *friends of the clean air movement*.” *Id.* (emphasis added). The term is being somewhat watered down by the newer meaning of, “any contact one has on a social networking site.” *See id.*

32. *Friend* (noun), A DICTIONARY OF THE ENGLISH LANGUAGE: A DIGITAL EDITION OF THE 1755 CLASSIC BY SAMUEL JOHNSON, http://johnsonsdictionaryonline.com/?page_id=7070&i=861 (last visited Nov. 24, 2014).

33. *Id.*

34. *Friend Definition*, OXFORD DICTIONARY OF ENGLISH (Angus Stevenson ed., 3d ed. 2010), <https://www.oxforddictionaries.com/definition/english/friend> (“[M]y **honourable friend** *Brit.* Used to address or refer to another member of one’s own party in the House of Commons. [M]y **learned friend** *Brit.* Used by a barrister or solicitor in court to address or refer to another barrister or solicitor. [M]y **noble friend** *Brit.* Used to address or refer to another member of one’s own party in the House of Lords.”).

35. Krislov, *supra* note 4, at 697.

36. *Id.*

37. *Id.* at 699–702.

State of Kentucky in an 1821 case involving land holdings.³⁸ It quickly became an accepted practice for the federal and state governments to appear as *amicus curiae* in the Supreme Court.³⁹

The appearance of private litigant *amici curiae* evolved more slowly.⁴⁰ These private litigants might be parties with similar cases likely to be affected by the ruling, or persons who just barely lacked intervenor status.⁴¹ Initially, it was not the represented party but the lawyer himself who was considered the “friend” of the court.⁴² But by the 1930s, it was quite common for the person or organization being represented to be denominated the *amicus curiae*.⁴³ Over time, minority, labor, business, and advocacy groups began to participate in greater number as *amici curiae* in court.⁴⁴ By the 1940s, some members of the Supreme Court were irritated at the rate of participation.⁴⁵ Subsequently, the Court began to exercise its gatekeeping powers and the rate declined.⁴⁶ However, by the 1950s the policy changed, and *amicus curiae* participation began to increase again.⁴⁷ In fact, *amicus curiae* played a critical role in the civil rights litigation of the 1950s and 1960s.⁴⁸

In recent decades, *amicus curiae* participation in the Supreme Court has escalated, even as the Court has tightened the standing requirements for litigants.⁴⁹ An empirical analysis showed that:

From 1986 through 1995, amici filed briefs in 85% of the Court’s argued cases. Between 1945 and 1995, the number of *amicus* brief fil-

38. *Id.* at 700 (referencing *Green v. Biddle*, 22 U.S. (8 Wheat.) 1 (1823)).

39. *Id.* at 701–02.

40. *See id.* at 702–03.

41. *See id.* at 703.

42. *Id.*

43. *Id.*

44. *Id.* at 710.

45. *See Caldeira & Wright, supra* note 24, at 784.

46. *Krislov, supra* note 4, at 713–14.

47. *Id.* at 714–16.

48. *See id.* at 718–20.

49. *See Caldeira & Wright, supra* note 24, at 784–85, 788; F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 289 (2008) (“In its original form, standing enforced the rule that the judiciary had the power only to vindicate private rights in suits by private litigants. During the mid-twentieth century, however, the Court expanded standing by abandoning the private rights requirement and conditioning standing on a showing of factual injury. Then, during the last twenty-five years, the Court has again restricted standing.”).

ings increased by more than 800%, while the numbers of cases decided on the merits did not increase. Between 1996 and 2003, at least one amicus brief was filed in 95% of cases.⁵⁰

One “prominent law firm partner” was quoted even thirty years ago as saying that “[i]n today’s world, effective representation of your client requires that you at least seriously explore the possibility of enlisting persuasive amicus support on your client’s behalf.”⁵¹ In 2013, the highly publicized Supreme Court case of *United States v. Windsor*⁵² attracted 134 appellate court briefs, according to Westlaw.⁵³ During the same term, *Shelby County v. Holder* attracted 63 total appellate court briefs, almost all of which were amicus briefs,⁵⁴ and the Affordable Care Act case, *NFIB v. Sebelius*, attracted over 140 amicus briefs.⁵⁵

Because the Court no longer screens amicus curiae in any meaningful way, it no longer creates law on the criteria for amicus curiae. Perhaps for that reason, a 1903 Supreme Court decision, *Northern Securities. Co. v. United States*, is still cited.⁵⁶ In that case, the Court denied an application to appear as amicus curiae and stated:

Where in a pending case application to file briefs is made by counsel not employed therein, but interested in some other pending case involving similar questions, and consent is given, the court has always exercised great liberality in permitting this to be done. And doubtless it is within our discretion to allow it in any case when justified by the circumstances. It does not appear that applicant is interested in any other case which will be affected by the decision of this case;

50. Simmons, *supra* note 2, at 193.

51. Andrew P. Moriss, *Private Amici Curiae and the Supreme Court’s 1997–1998 Term Employment Law Jurisprudence*, 7 WM. & MARY BILL RTS. J. 823, 825 (1999) (quoting Bruce J. Ennis, *Effective Amicus Briefs*, 33 CATH. U. L. REV. 603, 604 (1984)).

52. 570 U.S. ___, ___, 133 S. Ct. 2675, 2696 (2013) (holding that DOMA is invalid because it is a violation of the Fifth Amendment).

53. Appellate Court Filings, *United States v. Windsor*, 570 U.S. ___, 133 S. Ct. 2675 (2013), WESTLAW, <https://a.next.westlaw.com/> (search “133 S. Ct. 2675”; then click on “Filings”; then narrow by “Appellate Court Documents”; and finally by “Briefs”).

54. Appellate Court Filings, *Shelby County v. Holder*, 570 U.S. ___, 133 S. Ct. 2612 (2013), WESTLAW, <https://a.next.westlaw.com/> (search “133 S. Ct. 2612”; then click on “Filings”; then narrow by “Appellate Court Documents”; and finally by “Briefs”).

55. Appellate Court Filings, *NFIB v. Sebelius*, 570 U.S. ___, 132 S. Ct. 2566 (2012), WESTLAW, <https://a.next.westlaw.com/> (search “132 S. Ct. 2566”; then click on “Filings”; then narrow by “Appellate Court Documents”; and finally by “Briefs”).

56. *N. Sec. Co. v. United States*, 191 U.S. 555, 555–56 (1903); see, e.g., *Ryan v. Commodity Futures Trading Comm’n*, 125 F.3d 1062, 1063 (7th Cir. 1997) (citing *N. Sec. Co.*, 191 U.S. at 556 (1903)); see also *United States v. Michigan*, 940 F.2d 143, 165 (6th Cir. 1991) (citing *N. Sec. Co.*, 191 U.S. 555 (1903)).

as the parties are represented by competent counsel, the need of assistance cannot be assumed; and consent has not been given.⁵⁷

The *Northern Securities* decision expresses a much more limited view of the justification for amicus curiae than the Court now assumes. The case emphasizes the use of amicus curiae to make up for shortcomings in the representation of the parties or where amicus has an interest in a pending case with similar questions.⁵⁸ It says nothing about special perspective or information, the more common justifications for Friend of a Party briefs today.⁵⁹

Yet while the role of amicus curiae—and the rate of amicus participation—has expanded in the Supreme Court of the United States, the federal courts of appeals have not experienced the same rate of increase.⁶⁰ Although some federal judges complain about too many useless amicus briefs,⁶¹ one study of the United States Court of Appeals for the Eleventh Circuit showed that amicus filings actually decreased between 2003 and 2007 and that the total number of such filings was not substantial.⁶² Another study also suggests that amicus filings in all circuit level courts are low.⁶³ Because these are high volume intermediate level courts, it makes sense that professional amicus curiae advocacy groups are less attuned to their dockets and less likely to know about upcoming cases unless approached by a party.

The state experience has also been different from that of the Supreme Court. Even in the early part of the twentieth century, state courts were more likely to want amici curiae to be “neutral” rather than aligned with one of the parties.⁶⁴ In 1921, the Su-

57. *N. Sec. Co.*, 191 U.S. at 555–56 (internal citations omitted).

58. *Id.*

59. See Sorenson, *supra* note 8, at 1220.

60. See Simard, *supra* note 3, at 686; see also Sylvia H. Walbolt & Joseph H. Lang, Jr., *Amicus Briefs: Friend or Foe in Florida Courts?*, 32 STETSON L. REV. 269, 281–82 (2003) (highlighting, in particular, the rise of amicus participation in the Supreme Court of the United States).

61. Paul M. Collins Jr., & Wendy L. Martinek, *Who Participates as Amici Curiae in the U.S. Courts of Appeals?* 94 JUDICATURE 128, 130 (2010).

62. See P. Stephen Gidiere III, *The Facts and Fictions of Amicus Curiae Practice in the Eleventh Circuit Court of Appeals*, 5 SETON HALL CIR. REV. 1, 11–12 (2008).

63. See Simard, *supra* note 3, at 686–87. Though still low, there were slightly higher percentages of cases with amicus (15% or more) in the D.C. Circuit and the Ninth Circuit. See *id.* at 686–87 & n.75.

64. Sarah F. Corbally, Donald C. Bross & Victor E. Flango, *Filing of Amicus Curiae Briefs in State Courts of Last Resort: 1960–2000*, 25 JUST. SYS. J. 39, 43 (2004) (citing *People v. Gibbs*, 38 N.W. 257 (Mich. 1888)). Although the *Gibbs* court found no error in the attorney—formerly working with the prosecution—suggesting that the defendant be re-

preme Court of Michigan distinguished between *amicus curiae* and intervenors, stating that the former were welcome in cases of public import.⁶⁵ However, the court denied either status to a citizen who sought to participate in a suit between a city and a power company, because he was too interested to be an *amicus curiae* and not interested enough to be an intervenor.⁶⁶

In 1927, the Supreme Court of Wisconsin, in *In re Stolen*, rebuked sixty lawyers who filed an *amicus* brief in a judicial discipline case. Calling the brief a "petition," that court stated:

The brief itself did not pretend to examine or analyze the evidence, and, so far as a discussion of the law was concerned, it did no more than to cite a few cases upon the most fundamental propositions. If this was done deliberately and with the purpose of influencing the court, it was reprehensible. If done thoughtlessly and without any consideration, the opinions of these members of the bar are entitled to no weight If 60 members of the bar may thus petition the court with reference to matters pending before it, then 60 plumbers cannot be denied the same privilege.⁶⁷

The *In re Stolen* court seemed to object to a frank effort to lobby the court without even a fig leaf of legal argument.⁶⁸ But it is not clear that the court would have welcomed the brief even with legal argument. Wisconsin's present day rules for *amicus curiae* participation, however, are flexible.⁶⁹

Although the rate of *amicus curiae* participation in state courts is nowhere near that of the Supreme Court of the United States, it has grown, albeit unevenly. A 2004 article showed great variation in the rate of *amicus curiae* participation in the states.⁷⁰ It found higher *amicus curiae* participation in Alabama, California, Florida, Massachusetts, Michigan, New Jersey, New York, North Carolina, Ohio, and Washington.⁷¹ But the authors noted that

quired to plead guilty or not guilty to the charges, its reasoning was that any member of the bar could have made the suggestion. *Gibbs*, 38 N.W. at 258.

65. *City of Grand Rapids v. Consumers' Power Co.*, 185 N.W. 852, 854 (Mich. 1921).

66. *Id.* at 853–54; Krislov, *supra* note 4, at 704 & n.57.

67. *In re Stolen*, 214 N.W. 379, 387 (Wis. 1927) (citation omitted).

68. *See id.*; *see also* Garcia, *supra* note 2, at 336–38 (vigorously defending *amicus* participation as expressive activity protected by the First Amendment's Petition Clause).

69. WIS. STAT. § 809.19(7)(a) (2012) ("A person not a party may by motion request permission to file a brief. The motion shall identify the interest of the person and state why a brief filed by that person is desirable.").

70. *See* Corbally, Bross & Flango, *supra* note 64, at 44–46.

71. *See id.* at 46.

other studies had grouped the states slightly differently.⁷² The 2004 study also tentatively concluded that the states with the most restrictive rules created the restrictions in response to high amicus curiae participation⁷³ and that courts granted 70% of motions to file amicus briefs.⁷⁴ It was also rare for the courts to solicit amici curiae. Although the number of amicus briefs in state high courts tripled in the 1980s,⁷⁵ less than 5% of the high court decisions in Arkansas, Idaho, Iowa, South Dakota, and Texas involved amicus curiae briefs.⁷⁶

A survey of amici curiae in California showed a very high rate of participation. In the California Supreme Court, 1,868 amicus briefs were filed in 422 of the 707 civil cases decided between 2000 and 2009.⁷⁷

My own research shows variation consistent with these studies. In 2010, for example, the Washington Supreme Court issued 49 out of 141 reported opinions in which at least one amicus brief was filed (35%), while the California Supreme Court issued 54 out of 102 such opinions (53%). Arizona had 9 supreme court decisions in which amicus briefs were filed, out of a total of 41 reported opinions that year (22%).⁷⁸

Scholarly interest in amicus curiae has been intermittent over the last twenty-five years. Some scholars have attempted to empirically measure the effect of amicus briefs on case outcomes—a difficult task.⁷⁹ Scholars have also looked at interest group partic-

72. See *id.* at 45 (citing Paul Brace & Kellie Sims Butler, *New Perspectives for the Comparative Study of the Judiciary: The State Supreme Court Project*, 22 JUST. SYS. J. 243, 253 (2001) (finding high amicus curiae participation in California, Michigan, New Jersey, Oklahoma, and Oregon)).

73. Corbally, Brass & Flango, *supra* note 64, at 50. The authors rejected their hypothesis that more restrictive rules would mean fewer amicus briefs filed, concluding instead that restrictive rules were a reaction to larger numbers of amicus curiae filings. *Id.* at 53.

74. *Id.* at 53.

75. *Id.* at 44.

76. Brace & Butler, *supra* note 72, at 252–53.

77. M.C. Sungaila, *Effective Advocacy Through Amicus Briefs*, S.F. DAILY J., June 28, 2010, at 6.

78. These figures come from a Westlaw Next search of California, Washington, and Arizona Supreme Court opinions. To get these figures for each state, I first went to “state materials,” then clicked on the individual state, and then clicked on “supreme court” to restrict the search to the highest court. I then searched the supreme court opinions as follows: “adv: DA(=2010) & DI,SY(court)” for the total number of supreme court opinions, then searched within results for “at(amic!)” for the number of cases with at least one amicus brief.

79. See, e.g., Collins, *supra* note 5, at 810–16; Paul M. Collins, Jr., Pamela C. Corley &

ipation through a political science lens.⁸⁰ While some have examined the types of arguments and information provided by amici curiae, they have not addressed the very different roles subsumed within the categories of amicus curiae, nor have they addressed the tension between the ideal of the impartial friend and the reality of the interested lobbyist.

II. THE TYPES OF AMICUS CURIAE

Some scholars have examined the type of information or arguments presented by amicus curiae,⁸¹ but there has been no overall examination of the different types of amicus curiae and their different roles. Neither courts nor scholars have focused on the difference between the Court's Lawyer (an attorney asked to make a particular argument), the Invited Friend (one invited by the court to appear as amicus curiae), the Friend of a Party, the Independent Friend (amicus curiae not aligned with a party), and the Near Intervenor. Understanding the different roles is important as they call for different criteria and policy considerations.

The types of organizations and individuals who will participate as amici curiae also vary, ranging from activist or public advocacy groups, nonprofits, corporations, business alliances, and political organizations, to individuals (including law professors) concerned about the issue or the outcome of the case.⁸² One particular type of organization receives special treatment and is in a category by itself: the government.

A. Governmental Amici

The executive branch enjoys special status in both federal and state courts. Most courts allow the federal or state attorney general or solicitor general to file amicus briefs without advance

Jesse Hamner, *Me Too? An Investigation of Repetition in U.S. Supreme Court Amicus Curiae Briefs*, 97 JUDICATURE 228, 230 (2014); Kearney & Merrill, *supra* note 15, at 751–56.

80. See LEE EPSTEIN, CONSERVATIVES IN COURT, at xi–xii (1985); Caldeira & Wright, *supra* note 24, at 783; Donald R. Songer & Reginald S. Sheehan, *Interest Group Success in the Courts: Amicus Participation in the Supreme Court*, 46 POL. RES. Q. 339, 339–40 (1993).

81. See, e.g., Simmons, *supra* note 2, at 203–09 (examining the functions of amicus curiae briefs); Sorenson, *supra* note 8, at 1220–21 (discussing the basic functions of amicus curiae briefs).

82. See Caldeira & Wright, *supra* note 24, at 790–91 (listing different classifications of amici curiae).

permission, even where leave of the court is otherwise required for *amicus curiae*.⁸³ It is understood that many private disputes can have public importance and may affect the government or the enforcement of the laws.

While the attorney general or solicitor general is the usual court representative of a government's position, occasionally the corresponding chief executive might file an *amicus* brief on its own behalf. For example, in the recent litigation over the Affordable Care Act,⁸⁴ Governor Christine Gregoire of Washington joined several attorneys general of other states in an *amicus* brief in support of the legislation,⁸⁵ while Washington's attorney general joined in a brief against the law.⁸⁶ State legislators and members of Congress also filed *amicus* briefs in the litigation,⁸⁷ although in doing so, they did not represent the government as a whole.⁸⁸

83. See, e.g., FED. R. APP. P. 29(a) ("The United States or its officer or agency or a state may file an *amicus-curiae* brief without the consent of the parties or leave of court. Any other *amicus curiae* may file a brief only by leave of court or if the brief states that all parties have consented to its filing."); accord ARIZ. R. CIV. APP. P. 16(a) ("[L]eave or written consent shall not be required when the brief is presented by the State of Arizona or an officer or agency thereof, or by a county, city, or town."); CAL. R. CT. 8.520(f)(8) ("The Attorney General may file an *amicus curiae* brief without the Chief Justice's permission unless the brief is submitted on behalf of another state officer or agency.")

84. See, e.g., *NFIB v. Sebelius*, 567 U.S. ___, ___, 132 S. Ct. 2566, 2577 (2012); *Florida v. U.S. Dep't of Health & Human Servs.*, 648 F.3d 1235, 1240 (11th Cir. 2011).

85. See Brief of the States of Oregon, et al. as *Amici Curiae* in Support of Respondents at 1, *Florida v. U.S. Dep't of Health & Human Servs.*, 567 U.S. ___, 132 S. Ct. 2566 (2012) (No. 11-400). Governor Gregoire also filed her own brief at the court of appeals level. See *Amicus Brief of the Governor of Washington Christine Gregoire in Support of Defendants/Appellants, Florida v. U.S. Dep't of Health & Human Servs.*, 648 F.3d 1235 (11th Cir. 2011) (Nos. 11-11021, 11-11067).

86. Reply Brief of Appellee/Cross-Appellant States, *Florida v. U.S. Dep't of Health & Human Servs.*, 648 F.3d 1235 (11th Cir. 2011) (Nos. 11-11021, 11-11067).

87. E.g., Brief of Senate Majority Leader Harry Reid et al. as *Amici Curiae* in Support of Respondents at 1-2, *Florida v. U.S. Dep't of Health & Human Servs.*, 567 U.S. ___, 132 S. Ct. 2566 (2012) (No. 11-400).

88. See *Voices for Choices v. Ill. Bell Tel. Co.*, 339 F.3d 542, 545-46 (7th Cir. 2003). Judge Posner has opined that legislators cannot represent the government in an *amicus* brief.

There is something to be said for asking the state to speak in litigation with one voice. Insofar as the district court in the decision that has been appealed placed limitations on what a state legislature may do, not only in this case but presumably in any like case that should arise in the future, it might seem that the leaders of the legislature have a direct interest in other cases, one of the situations in which *amicus* participation is appropriate. But that argument would imply that *any* state legislator should have a right to file an *amicus curiae* brief when the constitutionality of state legislation is challenged—an extreme position that could invite a blizzard of briefs.

Government agencies can also participate as amici curiae. For example, one scholar has examined the Department of Labor's efforts to influence the interpretation of wage and hour legislation through amicus curiae activity.⁸⁹ The relatively new Consumer Financial Protection Bureau has a visible amicus curiae presence.⁹⁰

Although government officials—particularly the solicitors general or attorneys general—have a special amicus curiae status and role in many cases, they may also participate in most of the roles described below, although most likely not as the Court's Lawyer.

B. *The Court's Lawyer*

The Court's Lawyer is the court's hand-picked advocate who is asked to represent a particular position.⁹¹ The Supreme Court of the United States makes use of these appointed amici curiae to argue positions abandoned (or never advocated) by a party or to defend lower court reasoning neither party endorses.⁹² This latter type of amicus curiae is perhaps the most "friendly" to the court. But this friend is more of an *advocate* retained for the court—highly partisan rather than disinterested.

Id.

89. See Eisenberg, *supra* note 19, at 1226–28 (arguing that aggressive amicus activity and exploration of *Chevron* deference allows the department to avoid the rule-making process); see also *Christopher v. SmithKline Beecham Corp.*, 567 U.S. ___, ___, 132 S. Ct. 2156, 2166–67 (2012) (holding *Chevron* deference would not apply to amicus position where such deference would create "unfair surprise" or where the agency's position "does not reflect the agency's fair and considered judgment on the matter in question") (quoting *Auer v. Robbins*, 519 U.S. 452, 462 (1997)).

90. *Amicus Program*, CONSUMER FIN. PROT. BUREAU, <http://www.consumerfinance.gov/amicus/> (last visited Nov. 24, 2014).

91. See Goldman, *supra* note 19, at 916 (demonstrating the Supreme Court's willingness to propose "a friend of the court" be appointed to argue if counsel for respondent is unwilling).

92. See *id.* at 918. An example of this kind of amicus curiae is Professor Paul Cassel, invited to make the argument to overrule *Miranda v. Arizona* in *Dickerson v. United States*. See *Dickerson*, 530 U.S. 428, 441 & n.7 (2000); see also Brief for Court-Appointed Amicus Curiae Supporting Complete Severability at 1–2, *NFIB v. Sebelius*, 567 U.S. ___, 132 S. Ct. 2566 (2012) (Nos. 11-393 and 11-400) [hereinafter Brief for Court-Appointed Amicus Curiae] ("This brief is submitted in response to the Court's order of November 18, 2011, appointing counsel to brief and argue in support of the judgment of the United States Court of Appeals for the Eleventh Circuit that the minimum care provision of the Patient Protection and Affordable Care Act, 26 U.S.C. § 5000A, is severable from the entirety of the remainder of the Act.").

With this type, the term *amicus curiae* refers to the lawyer appointed to represent a position, not to a group or person represented by the lawyer. For all other types of *amici curiae*, the term usually refers to the client, often an interest group, rather than the lawyer who files the brief.⁹³ The Court's Lawyer seems close to one historical understanding of the term, reflected in the criteria for *amicus* applications in many jurisdictions. Some court rules suggest that an *amicus curiae* may be appropriate where one party is without counsel or poorly represented.⁹⁴ Thus, in the past, where the court believed one party needed additional representation, or that a particular argument needed development, it might have asked a lawyer to act as *amicus curiae*.⁹⁵ However, today's Court's Lawyers may be appointed regardless of the adequacy of party representation in proceedings below.⁹⁶

The Court's Lawyer type of *amicus curiae* seems problematic in that the court appears to be stepping out of its neutral arbiter role and promoting advocacy of particular positions, even where both parties are well-represented. On the other hand, these appointments can be seen as an effort by the court to fully air arguments it is considering but which the parties are not making. Once again, the Affordable Care Act litigation provides examples of this type of *amicus curiae*.⁹⁷ Interestingly, in that case, additional *amicus* briefs were filed in support of the court-appointed *amici curiae*; even the *amici* have *amici*!⁹⁸

93. See Mark Walsh, *Frequent Fliers: It Was Another Big Term for Amicus Curiae Briefs at the High Court*, A.B.A. J., Sept. 2013, at 16 (describing an increasing number of *amicus* briefs due to interest groups viewing them as strategy). Of course, sometimes the client and lawyer are one and the same. Individual lawyers now also file briefs on their own behalf as Friends of a Party. See *id.* at 17, 67 (noting the impact of a brief filed by former Solicitor General Walter Dellinger on his own behalf).

94. See *infra* notes 213–16 and accompanying text.

95. See *N. Sec. Co. v. United States*, 191 U.S. 555, 555–56 (1903) (suggesting that *amicus* could be appointed where one party was not competently represented).

96. See Goldman, *supra* note 19, at 916, 920, 924–25, 931–32 (noting that the Court may appoint “friends of the court” where the Respondent has since changed its position, where neither party accepts the lower court’s *sua sponte* decision, or where the Court raises its own question *sua sponte*).

97. Brief for Court-Appointed *Amicus Curiae*, *supra* note 92, at 1–2; Brief for Court-Appointed *Amicus Curiae* Supporting Vacatur (Anti-Injunction Act) at 1, *U.S. Dep’t of Health and Human Servs. v. Florida*, 567 U.S. ___, 132 S. Ct. 2566 (2012) (No. 11-398).

98. See *National Federation of Independent Business v. Sebelius*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/national-federation-of-independent-business-v-sebelius/> (last visited Nov. 24, 2014) (listing “*Amicus* Briefs in Support of the Court-Appointed *Amicus*”).

C. *The Invited Friend*⁹⁹

The Invited Friend is the individual, group, or institutional actor asked to provide its perspective. For example, the court might ask a government agency, another branch of the court system, or the attorney general to weigh in on issues of public import or issues that may affect that institution.¹⁰⁰ Unlike the Court's Lawyer, the Invited Friend is not assigned a particular position or argument but rather assists on a more generalized level.¹⁰¹ This type of amicus curiae is the prototype of the impartial friend, providing helpful advice or information.

D. *Friend of a Party*

The Friend of a Party amicus curiae usually coordinates with a party and may be solicited by a party.¹⁰² Some of these friends are actually "puppets" of the party:¹⁰³ the party may have created or funded the amicus curiae organization, or the party's lawyer may have actually authored the brief.¹⁰⁴ Not all states even require disclosure of such a connection and few forbid it outright.¹⁰⁵

99. In Canada and other Commonwealth countries, only those *invited* by the Court to submit briefs are properly called amicus curiae. See *supra* note 7 and accompanying text. Others who seek to file briefs in cases in which they are not a party are called "interveners." See *supra* note 7.

100. See, e.g., *Entente Design, Inc. v. Super. Ct.*, 154 Cal. Rptr. 3d 216, 219 n.2 (Cal. Ct. App. 2013) ("Although we recognize the superior court ordinarily lacks standing to oppose a petition such as this, we invited a response from the superior court because of the potential impact of our decision on the superior court's civil case management procedures.") (internal citations omitted) (holding that assignment of action to new judge was not within the master calendar rule's limitation on peremptory challenges to judges).

101. See David C. Thompson & Melanie F. Wachtell, *An Empirical Analysis of Supreme Court Certiorari Petition Procedures: The Call for Response and the Call for the Views of the Solicitor General*, 16 GEO. MASON L. REV. 237, 242 (2009) (referencing the Supreme Court's use of the solicitor general as an invited friend to assist in analyzing the position); Neal Nettesheim & Clare Ryan, *Friend of the Court Briefs: What the Curiae Wants in an Amicus*, 80 WIS. LAW. 10, 12 (2007) (noting how the court may solicit amicus participation where the parties have inadequately briefed an important issue).

102. See *Voices for Choices v. Ill. Bell Tel. Co.*, 339 F.3d 542, 544 (7th Cir. 2003); *Nat'l Org. for Women, Inc. v. Scheidler*, 223 F.3d 615, 617 (7th Cir. 2000).

103. See *Voices for Choices*, 339 F.3d at 544; *Scheidler*, 223 F.3d at 617.

104. See *Glassroth v. Moore*, 347 F.3d 916, 919 (11th Cir. 2003); *Scheidler*, 223 F.3d at 617.

105. *Glassroth*, 347 F.3d at 919 ("It comes as no surprise to us that attorneys for parties solicit amicus briefs in support of their position, nor are we shocked that counsel for a party would have a hand in writing an amicus brief. In fact, we suspect that amicus briefs are often used as a means of evading the page limitations on a party's briefs.") (internal citations omitted). The puppet amicus curiae can also risk making arguments that the

But even where there is no direct financial connection, party kinship may be clear, such as industry groups appearing on behalf of an industry party, unions supporting the position of an employee, or advocacy groups arguing for a position that benefits a minority group of which a party is a member. Although the Friend of a Party *amicus curiae* is very common today, especially in the Supreme Court, some courts remain suspicious of *amici curiae* with close connections to a party.¹⁰⁶

It is the Friend of a Party category of *amicus curiae* whose participation has grown the most over the last century, especially in recent decades.¹⁰⁷ This is the prototypical *amicus curiae* that now springs to mind when we hear the term. We think of an interest or advocacy group, induced to participate because the issue is important to its membership. Friend of a Party *amici curiae* may also hope that *amicus* participation will serve their efforts to gain visibility. *Amicus* briefs become another means of lobbying on behalf of the membership.¹⁰⁸

Friend of a Party briefs can also be a part of a coordinated law reform effort. For example, the United States Chamber of Commerce has enjoyed success with its efforts in the Supreme Court

party dare not. See Dan Schweitzer, *Fundamentals of Preparing a United States Supreme Court Amicus Brief*, 5 J. APP. PRAC. & PROCESS 523, 532 (2003).

106. See *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997); *Liberty Lincoln Mercury Inc., v. Ford Marketing Corp.*, 149 F.R.D. 65, 82 (D.N.J. 1993) ("When the party seeking to appear as *amicus curiae* is perceived to be an interested party or to be an advocate of one of the parties to the litigation, leave to appear *amicus curiae* should be denied . . . [But] [w]here a petitioner's attitude toward a litigation is patently partisan, he should not be allowed to appear as *amicus curiae*.") (internal quotations and citations omitted); see also Andrew Frey, *Amici Curiae: Friends of the Court or Nuisances?*, 33 LITIG. 5, 5 (2006) (referencing the recent "movement of marked antipathy to *amicus* briefs" generally, including Judge Posner's hostility).

107. See *supra* note 5 and accompanying text.

108. Advocacy group websites often tout *amicus* brief filings. See, e.g., *Amicus Curiae Briefs*, ABA, <http://www.americanbar.org/groups/committees/amicus.html> (last visited Nov. 24, 2014) (listing some recent *amicus* briefs filed by the ABA in various cases); *The Internet Association Files Amicus Brief to Quash the NYAG Subpoena Against Airbnb*, INTERNET ASS'N (Nov. 18, 2013), <http://internetassociation.org/11082013airbnbamicusbrief/> (publishing news of the Internet Association's filing of an *amicus* brief in a press release); *Amicus Briefs*, NAT'L ASS'N OF CRIM. DEF. L., <http://www.nacdl.org/Amicus/> (last visited Nov. 24, 2014) (providing links to the NACDL's *Amicus Curiae* Committee Mission Statement and former *amicus* briefs catalogued by year); *EPIC Amicus Curiae Briefs*, ELEC. PRIVACY INFO. CTR., <http://epic.org/amicus/> (last visited Nov. 24, 2014) ("EPIC frequently files *amicus curiae*, or 'friend of the court', briefs in federal and state appellate cases concerning emerging privacy and civil liberties issues."). Even government agencies boast of their *amicus* activity. *Accord Amicus Program*, CONSUMER FIN. PROT. BUREAU, <http://www.consumerfinance.gov/amicus/> (last visited Nov. 24, 2014).

and is now increasingly filing amicus briefs in state courts.¹⁰⁹ The International Association of Defense Counsel also boasts of its amicus curiae record in federal and state court.¹¹⁰

E. *Independent Friend*

The Independent Friend amicus curiae is an organization or individual who does not support either party.¹¹¹ They may participate for the same reasons that groups decide to weigh in as Friends of a Party: because the issue is important to them and/or their membership. Although most amici curiae will pick sides in the dispute, it is not necessary that they do so.¹¹² The Independent Friend seems to be relatively rare, however. After the Supreme Court granted certiorari in the case of *Sebelius v. Hobby Lobby*, for example, only two amicus briefs were filed on behalf of neither party out of eighty-four total.¹¹³

F. *Near Intervenors*

Near Intervenors are people or groups likely to be affected by a case but whose interest is not sufficient for intervention.¹¹⁴ Not all courts allow amicus curiae with this type of interest, on the

109. Holly Yeager, *U.S. Chamber, Other Business Groups Set Sights on State Courts*, WASH. POST, Nov. 6, 2013, at A5.

110. See Mary-Christine Sungaila, *The IADC Amicus Brief Program: Its Increasing Success and Influence*, 81 DEF. COUNS. J. 32, 34 (2014).

111. See Eileen Denza, *The Relationship Between International and National Law*, INT'L L. 415, 428 (Malcom D. Evans ed., 1st ed. 2005).

112. Yet too much independence can also thwart amicus curiae status. For example, an amicus curiae application by an organization that supported neither party's position—where the parties were not opposed—was held properly excluded. *State v. Ross*, 863 A.2d 654, 656, 674 (Conn. 2005) (ruling that where the defendant did not contest the death penalty, it was not an abuse of discretion to deny the public defender organization amicus curiae, intervenor, or next friend status). In another example, attorneys for a district court judge sought to appear as amicus curiae in a case which had been reassigned to another judge, and the Second Circuit Court of Appeals held that neither the judge nor her attorneys had sufficient interest to appear as amicus curiae. *Ligon v. City of New York*, 736 F.3d 166, 169–71 (2d Cir. 2013).

113. *Sebelius v. Hobby Lobby Stores, Inc.*, 732 F.3d 1114 (10th Cir. 2013), cert. granted, 134 S. Ct. 678 (2013). See the list of amici curiae in the case including the two filed on behalf of neither party at *Amicus History: Hobby Lobby Supreme Court Amicus Briefs Among Record Levels*, BECKET FUND FOR RELIGIOUS LIBERTY, <http://www.becketfund.org/hobbylobbyamicus/> (last visited Nov. 24, 2014).

114. *Rios v. Enterprise Ass'n Steamfitters Local Union No. 638*, 520 F.2d 352, 357 (2d Cir. 1975) (denying applicants intervention because of a lack of sufficient interest in the case).

grounds that an *amicus curiae* should be an impartial advisor to the judiciary.¹¹⁵ But many courts will use this *amicus curiae* category as a remedy for those who cannot make a showing for intervention. For example, the Supreme Court of New Jersey noted that a crime victim, even if lacking standing in the defendant's appeal, could participate as an *amicus curiae*.¹¹⁶ In another example, an Indian tribe was denied permission to intervene in a dispute between two casino developers, but was allowed to file an *amicus* brief "because of its involvement in the events leading to this case and its interest in the Transactions Agreements at issue."¹¹⁷ Additionally, a local irrigation district was permitted to file an *amicus* brief in a Clean Water Act case against dairy operations.¹¹⁸ There are other examples.¹¹⁹ This Near Intervenor type of *amicus curiae* will be anything but impartial. Such amici are advocates of their own private interests.¹²⁰ Some court rules acknowledge this possibility and ask amici *curiae* to disclose whether their interest in the case is private or public.¹²¹

115. *Leigh v. Engle*, 535 F. Supp. 418, 420 (N.D. Ill. 1982) ("Indeed, if the proffer comes from an individual with a partisan, rather than impartial view, the motion for leave to file an *amicus* brief is to be denied, in keeping with the principle that an *amicus* must be a friend of the court and not a friend of a party to the cause."). *But see Neonatology Assocs. v. Comm'r*, 293 F.3d 128, 130–31 (3d Cir. 2002) (discussing generally the difficult conflict between impartiality and interest, but noting that an *amicus curiae* is implicitly required to have an interest in the case).

116. *State v. Tedesco*, 69 A.3d 103, 109 (N.J. 2013) ("The victim's arguments should be heard and evaluated, if not as a party with standing, then as an *amicus* under *Rule* 1:13-9.").

117. *NGV Gaming, Ltd. v. Upstream Point Molate, LLC*, 355 F. Supp. 2d 1061, 1063, 1068 (N.D. Cal. 2005).

118. *Cnty. Ass'n for Restoration of the Env't (CARE) v. DeRuyter Bros. Dairy*, 54 F. Supp. 2d 974, 975–76 (E.D. Wash. 1999).

119. In a dispute between the United States government and a firm constructing caissons on coral reefs, a federal district court denied the right to intervene to one who claimed to own the reef, but allowed the would-be intervenor to proceed as an *amicus curiae*. *Atlantis Dev. Corp. v. United States*, 379 F.2d 818, 820–22, 829 (5th Cir. 1967) (reversing the district court decision and allowing the party to intervene); *see also Silver v. Babbitt*, 166 F.R.D. 418, 434–35 (D. Ariz. 1994) *aff'd*, 68 F.3d 480, 481 (9th Cir. 1995) (denying motion to intervene but granting *amicus curiae* status).

120. *See, e.g., NGV Gaming*, 355 F. Supp. 2d at 1068 ("[A]micus with partisan interests are now quite common.").

121. *See, e.g., MINN. R. CIV. APP. P. 129.01* (requiring that an *amicus* request must "identify whether the applicant's interest is public or private in nature"); *N.J. GEN. R. 1:13-9(a)* (requiring that *amicus* must state "the nature of the public interest therein and the nature of the applicant's special interest, involvement or expertise in respect thereof"); *OR. R. APP. P. 8:15* ("The application shall state whether the applicant intends to present a private interest of its own or to present a position as to the correct rule of law that does not affect a private interest of its own.").

The Near Intervenor should be distinguished from the amicus curiae who is interested in the outcome because it has a similar case pending, one that could be controlled by precedent set in the instant case. The latter type of amicus will probably fall into the Friend of a Party category (e.g., an employer involved in another lawsuit that will be controlled by the precedent). If the precedent is likely to be of wide applicability—as is usually true in the Supreme Court—then an interest group (e.g., an employer association) will probably weigh in. In contrast, the Near Intervenor has an interest in the particular dispute at issue, not just its likely precedential value.

The Near Intervenor may wish for more involvement in the case than amicus curiae status allows. An experiment with “litigating amicus curiae”¹²² illustrates what can happen when the categories are blended.

Decried as a “legal mutant” by the Sixth Circuit,¹²³ this type of amicus curiae appears to have been a hybrid status used by trial courts for a time in the 1980s and 1990s.¹²⁴ The hybrid had an intervenor’s ability to file pleadings and present evidence, but did not need to satisfy the more demanding requirements of intervenor status.¹²⁵ Instead, courts used the flexible definition of an amicus curiae. Often, it was the U.S. Attorney who received this status.¹²⁶ After the Sixth Circuit’s denunciation of the practice, there have been few references to “litigating amicus curiae” in the case law. The term seems to have died away.¹²⁷ Like most

122. See generally Michael K. Lowman, *The Litigating Amicus: When Does the Party Begin After the Friends Leave?*, 41 AM. U. L. REV. 1243, 1245 (1992) (discussing the development of the “litigating amicus curiae,” a type of amicus which possesses the capability to participate in a case beyond mere brief writing).

123. *United States v. Michigan*, 940 F.2d 143, 164 (6th Cir. 1991).

124. See *Wyatt v. Hanan*, 868 F. Supp. 1356, 1359 (M.D. Ala. 1994) (“The court believes that the concept of amicus curiae is flexible and that, as long as the amicus does not intrude on the rights of the parties, it can have a range of roles: from a passive one of providing information to a more active participatory one. In other words, although amici should not assume control of the litigation, they can take an active role in some cases beyond providing information.”); *DeVonish v. Garza*, 510 F. Supp. 658, 658–59 (W.D. Tex. 1981) (noting that the court appointed the federal government to participate as litigating amicus curiae in litigation over conditions at the county jail).

125. See *EEOC v. Boeing Co.*, 109 F.R.D. 6, 11 (W.D. Wash. 1985).

126. Krislov, *supra* note 4, at 705. Krislov recounts instances during the desegregation era when the federal district courts of Arkansas and Mississippi designated the United States Attorney as amicus curiae with authority to file pleadings, submit evidence, and initiate further proceedings in order to maintain and preserve the due administration of justice. *Id.* at 718–20.

127. See, e.g., *NGV Gaming, Ltd. v. Upstream Point Molate, LLC*, 355 F. Supp. 2d

hybrids, it has been unable to reproduce. The story of the “litigating amicus curiae” shows the limits of the flexibility of the amicus curiae role.

The Sixth Circuit’s *United States v. Michigan* decision involved a suit by the federal government against the State of Michigan over prison conditions.¹²⁸ The would-be intervenors were a group of prisoners who eventually were represented by the American Civil Liberties Union (“ACLU”) and a prisoners’ rights group.¹²⁹ When the trial court denied them permission to intervene as real parties in interest, it allowed the prisoners to continue as amicus curiae, and then allowed them as “litigating amicus curiae” to file pleadings.¹³⁰ The reviewing court found that as amicus curiae, the prisoners had hijacked the case:

There can be little doubt from the record of this appeal that the *Knop* class, in its role of “litigating amicus curiae” and exercising the authority of a named party/real party in interest, has virtually assumed effective control of the proceedings in derogation of the original parties to this controversy. The creation of this legal mutant characterized as “litigating amicus curiae,” as demonstrated by the cascading acrimony among the participants to this litigation, if accorded precedential viability, will implicate and erode the future core stability of American adversary jurisprudence as we know it today.¹³¹

1061, 1068 (N.D. Cal. 2005) (“[A]n amicus curiae is not a party and has no control over the litigation and no right to institute any proceedings in it . . . [p]articipation is restricted to suggestions relative to matters apparent on the record . . .”) (citing *Michigan*, 940 F.2d at 163–64, and its disapproval of “legal mutant” called the “litigating amicus curiae”); Simard, *supra* note 3, at 694. A survey of federal judges published in 2008 found that most of them opposed the idea of “litigating amicus curiae.” *Id.* (“Not surprisingly, the respondents at all levels of the federal judiciary do not see tremendous utility in litigating amici. Specifically, 90.9% of Circuit Court respondents and 89% of District Court respondents indicated that litigating amici are a hindrance or a neutral consideration in litigation. Two Supreme Court respondents indicated that litigating amici would be a hindrance.”).

128. *Michigan*, 940 F.2d at 145–46.

129. *Id.* at 146.

130. *Id.* at 147.

131. *Id.* at 164. The court went on to say:

Neither the appellees nor the trial court have advanced, beyond conclusory generalizations and conjecture, a persuasive argument that the trial court’s “litigating amicus curiae” order, whatever that term implies, does not seriously impinge the inherent rights of the only real parties in interest to this CRIPA litigation between the United States and Michigan. The district court’s order has, by extrajudicial edict, impressed upon the United States and Michigan a third-party legal interloper in the persona of the NPP-ACLU and the ACLUFM acting through their structured willing surrogate, the *Knop* class, all of whom had been denied real-party-in-interest status and whose efforts to achieve that end had been earlier barred by the trial court. The legal consequence of the district court’s order was to achieve, by circum-

* * * * *

The amicus curiae types outlined above are not perfectly distinct. The discussion of governmental amici refers to a particular type of actor, rather than its role in the litigation, and governmental amici may be a Friend of a Party, an Invited Friend, or an Independent Friend. The Near Intervenor or Invited Friend may also have an interest in the legal precedent set, and its interests may align with a party so that it is also a Friend of a Party. Nevertheless, despite possible overlap, the categories are helpful in developing a clearer analysis of the role of amici curiae.

III. THE BARE CONSTRAINTS

Amicus briefs must comply with the applicable court rules,¹³² but amicus curiae brief writers have great flexibility in choosing what issues to address and how to address them. Due dates and page limits vary with the jurisdiction, and these variations can greatly affect how amici curiae participate. Criteria for amicus curiae participation are fairly relaxed in most courts, and the prevailing judicial attitude, with a few exceptions, is one of complacency.

A. *The Amicus Curiae Brief*

1. Content

Amici curiae, of whatever type, have great flexibility in the arguments and factual material they present to the court. Given how strictly courts apply the rules of evidence, waiver, and standing to the parties, the freedom accorded amici curiae is striking.

Although the parties are limited in their factual arguments to what is in the appellate court record and permitted by the rules of evidence below, amici curiae routinely present "legislative facts" in support of policy arguments.¹³³ They can also present what

vention, a result that effectively and impermissibly abused all conventional laws and judicial rules of civil practice and procedure for acquiring the status and rights of a named party/real party in interest, including Fed. R. Civ. P. 14 and 17 through 25.

Id.

132. See *infra* Part III.A.2.

133. *Id.* at 675 & n.24. One of the first examples of this type of amicus curiae brief is

amounts to testimony by individuals who were not involved in the case.¹³⁴ This type of “new information” is frequently cited as the benefit of amici curiae; it is precisely this information—not put forward by the parties—that is said to be of assistance to the court.¹³⁵ The more general the information provided, the less controversial, especially in an era when courts can easily conduct their own Internet research. Yet there is an argument that even the presentation of new “legislative facts” in amicus briefs undercuts the adversarial process and encourages appellate court “extra-record factfinding.”¹³⁶ Legislative facts introduced in this way are not tested in the way that they might be were they introduced and argued about in the trial court.¹³⁷

But even if amici curiae can freely present legislative facts, should amici curiae be allowed to submit new facts about the particular dispute at issue?¹³⁸ This is precisely the type of evidence the Near Intervenor might want to present. For example, a nearby landowner may want to bring in new facts about a dispute between two other landowners, or a crime victim might want to tell the court additional (or different) facts about the crime and its effect. We presume that judges, unlike juries, can distinguish between admissible and inadmissible information and that they will disregard what is not permissible, even on appeal. But with certain information, it may be just as difficult to “unring the bell” for judges as for jurors.¹³⁹ A party can move to strike an amicus brief

Louis Brandeis’s brief in *Muller v. Oregon*. See *infra* note 151.

134. Larsen, *supra* note 19, at 25. An example is the brief filed by the National Abortion Rights Action League in *Thornburgh v. American College of Obstetricians and Gynecologists*. Lynn M. Paltrow, *Amicus Brief: Richard Thornburgh v. American College of Obstetricians and Gynecologists*, 9 WOMEN’S RTS. L. REP. 3, 4–5 (1986). The brief consisted largely of personal accounts by women who had undergone abortions. *Id.* at 4. In another example, in *Gratz v. Bollinger*, a brief filed on behalf of military commanders described the history and importance of diversity in the military. Consolidated Brief of Lt. Gen. Julius W. Becton, Jr. et al. as Amici Curiae in Support of Respondents at 5, *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-516).

135. Simard, *supra* note 3, at 682, 690. Even Judge Posner agrees that amicus curiae briefs should be permitted “when amicus has unique information or perspective that can help the court” *Ryan v. Commodity Futures Trading Comm’n*, 125 F.3d 1062, 1063 (7th Cir. 1997).

136. See Gorod, *supra* note 19, at 37; Larsen, *supra* note 19, at 42.

137. See Gorod, *supra* note 19, at 60–61.

138. Walbolt & Lang, *supra* note 60, at 291 (discussing the difference between “legislative facts,” which amici curiae should be allowed to present, and “nonrecord facts” about the particular dispute at issue, which no party or amicus curiae should be allowed to introduce on appeal).

139. See Alan Hirsch, *Confessions and Harmless Error: A New Argument for the Old Approach*, 12 BERKELEY J. CRIM. L. 1, 14 (2007) (arguing that confessions have an impact

with improper factual material, but the damage may already be done.

Some trial court judges, aware that amici curiae—particularly amici curiae with their own private interests, i.e., Near Intervenors—may wish to introduce new evidence, preemptively direct amici curiae not to introduce “extra-record materials.”¹⁴⁰ In appellate courts, factual review is already limited to what has been made part of the record below¹⁴¹—but the line between the record and the wide world of Internet and book research is hard to draw. It is clear that an amicus curiae is free to take risks with crossing that line. Since an amicus will not be directly bound by the court’s judgment,¹⁴² it has less to lose if it irritates the court with new facts.

Amici curiae have a similar freedom with their arguments and thus may raise arguments that the parties would be foreclosed from making.¹⁴³ Again, these new arguments are often considered a benefit to the court. The Supreme Court has considered new issues raised first by an amicus curiae,¹⁴⁴ and even appoints amici curiae—of the Court’s Lawyer variety—to consider issues abandoned or never raised by the parties.¹⁴⁵

Most other courts distinguish between entirely new issues—which an amicus curiae may not present—and theories in support of issues raised by the parties. As a Florida court said, in refusing to consider new issues raised by amici curiae,

A significant distinction is apparent as between “issues” and “theories” in support of a particular issue. Amicus is not confined solely to arguing the parties’ theories in support of a particular issue. To so confine amicus would be to place him in a position of parroting “me

on appellate judges reviewing challenges to convictions).

140. *Wilderness Soc’y v. U.S. Bureau of Land Mgmt.*, No. 09-CV-08010-PCT-PGR, 2010 U.S. Dist. LEXIS 74709, at *6 (D. Ariz. June 21, 2010); *see also* *NGV Gaming, Ltd. v. Upstream Point Molate, LLC*, 355 F. Supp. 2d 1061, 1068 (N.D. Cal. 2005).

141. DANIEL J. MEADOR & JORDANA S. BERNSTEIN, *APPELLATE COURTS IN THE UNITED STATES* 2, 55 (1994).

142. *See* Sorenson, *supra* note 8, at 1238.

143. Simard, *supra* note 3, at 674–75. Many state jurisdictions will not consider new issues raised only by amicus curiae. The Supreme Court of the United States, however, has decided cases based on the arguments of amicus on a number of occasions. *See infra* Part III.B.1.

144. *See infra* Part III.B.1.

145. *See supra* Part II.B.

too" which would result in his not being able to contribute anything to the court by his participation in the cause.¹⁴⁶

As the Florida court further observed, if amici curiae hew too close to the facts and arguments presented by the parties, they risk having their submissions perceived as "me too" briefs that add nothing but their "vote" to one side or the other.¹⁴⁷ Although such briefs are often derided as providing little assistance to the court, some litigants frankly acknowledge their usefulness as an "endorsement."¹⁴⁸ As one amicus brief author stated, "Its purpose is to tell the court that we agree with the appellant and we hope it will decide in his favor."¹⁴⁹ While such signaling may have a valuable democratic function in the federal courts, it is more problematic in state courts with an elected bench. Should such lobbying of the state courts be permitted?¹⁵⁰

Finally, as nonparties with less at stake than the parties to the dispute, amici curiae enjoy a certain freedom to innovate in brief-writing. It was amicus curiae that filed the first Brandeis brief,¹⁵¹ the first electronic brief in the Supreme Court¹⁵² and the first

146. Walbolt & Lang, *supra* note 60, at 291 (quoting *Keating v. State*, 157 So. 2d 567, 569 (Fla. Dist. Ct. App. 1963)).

147. *Keating*, 157 So. 2d at 569.

148. See Simmons, *supra* note 2, at 203.

149. Krislov, *supra* note 4, at 712 (quoting an exchange between Charles Abrams and Newman Levy of the American Jewish Committee). Levy also said that if his brief repeated the arguments of the appellant, and the court relied on those arguments in its ruling, "We would be able to say to our members, 'Isn't that exactly what we told the court?'" *Id.* at 713.

150. In 1927, the Supreme Court of Wisconsin believed there was something reprehensible about a direct attempt to influence the court through an amicus brief by weighty signatories. *In re Stolen*, 214 N.W. 379, 387 (Wis. 1927). Of course, powerful interests can always make their views known in another forum if the amicus curiae route is foreclosed. They might write op-ed pieces in the paper, for example. In some ways, the amicus brief simply allows those interest groups to make their views known in a more transparent way.

151. Louis Brandeis's brief in *Muller v. Oregon*, 208 U.S. 412 (1908), celebrated as an innovation for its reliance on social science rather than legal argument, was more like an amicus brief. Although Brandeis filed his brief on behalf of the State of Oregon, the state attorney general also filed a traditional brief devoted to legal argument, with citation. David E. Bernstein, *Brandeis Brief Myths*, 15 GREEN BAG 2d 9, 12 (2011).

152. In 1995, a law professor attempted to file a hyperlinked amicus brief with the Court, but it was rejected. Michael Whiteman, *Appellate Court Briefs on the Web: Electronic Dynamos or Legal Quagmire?*, 97 LAW LIBR. J. 467, 469 n.16 (2005). The Court accepted a hyperlinked CD-ROM amicus brief the next year, however. See Brief of Amici Curiae Am. Ass'n of Univ. Professors, et al., in Support of Appellees, *Reno v. ACLU*, 521 U.S. 844 (1997) (No. 96-511), 1997 WL 74396. See generally Elizabeth Porter, *Taking Images Seriously*, ___ COLUM. L. REV. (forthcoming 2014) (discussing images in written legal argument).

graphic (comic book) brief in federal court.¹⁵³ As one scholar commented on the graphic brief, “[A]mici may feel more freedom to experiment with traditional legal forms given their quasi-outsider status to litigation.”¹⁵⁴ No attorney representing a party to the litigation would take the chance of filing a “comic book” brief on the merits.

2. Due Dates and Page Limits

Like the rules in most courts, Rule 37 of the Rules of the Supreme Court of the United States seems based on the assumption that amicus briefs will be in support of a party and bases filing deadlines on that assumption. The rule requires an amicus curiae brief to be filed within seven days of the filing of the merits brief by the party it supports “or if in support of neither party, within 7 days after the time allowed for filing the petitioner’s or appellant’s brief.”¹⁵⁵ Amicus briefs in the Supreme Court are limited to 9000 words, while parties’ briefs can be up to 15,000 words.¹⁵⁶ The federal courts of appeals have a similar seven-day deadline¹⁵⁷ and limit the amicus brief to one-half the length limit for a party’s brief on the merits.¹⁵⁸

Similarly, in most states, the rules seem to anticipate close cooperation between amici curiae and a party, even in states where amici curiae are exhorted to be true friends of the court. A significant number of states require the amicus brief to be filed at the same time as the brief of the party that the amicus curiae supports.¹⁵⁹ Another group requires the brief to be filed within seven days of the party’s brief.¹⁶⁰ Others give the amicus curiae a longer

153. Brief of Bob Kohn as Amicus Curiae, *United States v. Apple, Inc.*, 952 F.2d 638 (S.D.N.Y. 2013) (No. 12-2826), available at <http://www.abajournal.com/files/AppleAmicusBrief.pdf>.

154. Porter, *supra* note 152, at 46.

155. SUP. CT. R. 37.3(a). The rule also specifies deadlines for an amicus curiae brief filed in support of the granting of certiorari. SUP. CT. R. 37.2.

156. SUP. CT. R. 33.1(g).

157. FED. R. APP. P. 29(e).

158. FED. R. APP. P. 29(d).

159. See, e.g., ILL. SUP. CT. R. 345(b); IND. R. APP. P. 41(b); IOWA R. APP. P. 6.906(1); LA. SUP. CT. R. 7(12); MASS. R. APP. P. 17; MO. SUP. CT. R. 84.05(f)(2); N.H. SUP. CT. R. 30(1); N.C. APP. R. 28(i); OKLA. SUP. CT. R. 1.12(d)(1); PA. R. APP. P. 531(a)(1); R.I. SUP. CT. R. 16(h); VT. R. APP. P. 29(c); VA. SUP. CT. R. 5:30(d); W. VA. R. APP. P. 30(d).

160. See, e.g., DEL. SUP. CT. R. 28(e); MINN. R. CIV. APP. P. 129.02; MISS. R. APP. P. 29(b); NEV. R. APP. P. 29(f); N.M. R. APP. 12-215(c); OR. R. APP. P. 8.15(4); UTAH R. APP. P. 25.

time to file its brief.¹⁶¹ If amici curiae and the parties want to be sure that they do not duplicate each other, those with similar deadlines will need to cooperate. Same time filing also allows the parties to address the arguments of opposing amici curiae in their own responding or reply briefs. Where amici curiae have later deadlines, the parties may need to file additional responding briefs, if allowed.

The page limits for amicus briefs also say something about the states' view of amicus curiae participation. Like the federal courts, several states limit amicus briefs to one-half the length allowed for the party they support.¹⁶² A few others have fairly restrictive numerical limits of fifteen¹⁶³ or twenty¹⁶⁴ pages. But other states allow amici curiae to file lengthy briefs.¹⁶⁵ These page limits appear especially generous when one remembers that amicus briefs need not include a statement of the case, nor address every issue presented by the parties.

With the filing of the brief, amicus curiae participation is over. Amici curiae do not have standing to file appellate motions, such as a motion for reconsideration or a motion to strike.¹⁶⁶ Amici curiae have no right to demand that their arguments be considered by the court. Amicus curiae participation in oral argument is rare.¹⁶⁷ And amici may not file a reply to a party's response to the

161. See, e.g., CAL. R. CT. 8.520(f) (requiring filing within thirty days after all parties' briefs are filed); CONN. PRAC. BOOK § 67-7 (2014 ed.) (requiring filing within twenty days of the filing of the brief of the party whom amicus supports); KAN. SUP. CT. R. 6.06(b)(1) (requiring filing within thirty days before oral argument); ME. R. APP. P. 9(e)(1) (requiring filing the same day as brief of appellee); NEB. CT. R. 2-109(A)(4) (requiring filing within twenty days before oral argument); WASH. R. APP. P. 10.2(f) (requiring filing within forty-five days before oral argument).

162. See, e.g., IOWA R. APP. P. 6.906(3); NEV. R. APP. P. 29(e).

163. See KY. R. CIV. P. 76.12; MISS. R. APP. P. 29(b).

164. See LA. SUP. CT. R. 7-12; WASH. R. APP. P. 10.4(b).

165. See ME. R. APP. P. 9(e)(1) (allowing fifty pages); WYO. R. APP. P. 7.12(d) (allowing thirty-five pages). At one time, West Virginia had no page limit on amicus briefs, and a judge noted that one amicus brief was "certified by the Clerk of [] Court as weighing one and three-eighths pounds." Amy M. Smith, *The History and Evolution of Amicus Curiae in West Virginia*, W. VA. LAW., Sept. 2013, at 42, 44 (quoting *City of Fairmont v. Pitrolo Pontiac-Cadillac Co.*, 308 S.E.2d 527, 539-40 (W. Va. 1983)). In the words of the judge, "[s]ome friend." *City of Fairmont*, 308 S.E.2d at 540.

166. See SUP. CT. R. 37.3. ("The Clerk will not file a reply brief for an *amicus curiae*, or a brief for an *amicus curiae* in support of, or in opposition to, a petition for rehearing.") But see GA. SUP. CT. R. 23 ("Amici do not have standing to file motions for reconsideration, but may submit briefs in support of a motion made by a party.").

167. See, e.g., FED. R. APP. P. 29(g) ("An amicus curiae may participate in oral argument only with the court's permission."); ALASKA R. APP. P. 212(9) ("A motion of an amicus curiae to participate in the oral argument will be granted only for extraordinary rea-

amicus brief.¹⁶⁸ Nevertheless, in filing a brief on the merits, amicus curiae at the appellate level are allowed to do almost as much as the parties.

B. *Judicial Attitudes Toward Amicus*

Courts do not seem to distinguish between the various types of amicus curiae. The fuzziness of the amicus curiae category is in striking contrast to the complex and constraining rules of procedure that govern who can be a party and what issues may be raised by whom.¹⁶⁹ Most judges are probably welcoming—or at the very least complacent—about amicus curiae participation. But whether judges praise amicus curiae contributions or complain about amicus brief abuse, they do not articulate rules that distinguish between, for example, Near Intervenors, Friends of a Party, or Independent Friends. Instead, they discuss loose concepts such as “helpfulness to the court,” or they appeal to the concept of friendliness.¹⁷⁰ Nor do the court rules governing amicus curiae participation make clear distinctions between the various types of amici.

1. Supreme Court of the United States

The current rule governing amicus curiae in the Supreme Court states:

An *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may

sons.”); ARK. SUP. CT. R. 4-6(b) (“Amici Curiae attorneys will not be permitted to participate in oral arguments.”).

168. *E.g.*, FED. R. APP. P. 29(f).

169. *See, e.g.*, Eugene Kontorovich, *What Standing Is Good For*, 93 VA. L. REV. 1663, 1670 (2007) (“[T]he various Article III justiciability doctrines—standing, ripeness, mootness, political question, advisory opinions—all try to define the contours of the case-or-controversy limitation.”).

170. *See, e.g.*, *Voices for Choices v. Ill. Bell Tel. Co.*, 339 F.3d 542, 544–45 (7th Cir. 2003); *Ryan v. Commodity Futures Trading Comm’n*, 125 F.3d 1062, 1063 (7th Cir. 1997); *Miller-Wohl Co. v. Comm’r of Labor & Indus.*, 694 F.2d 203, 204 (9th Cir. 1982); *Neonatology Assocs., P.A. v. Comm’r.*, 293 F.3d 128, 132–33 (3rd Cir. 2002); *Wildearth Guardians v. Lane*, No. CIV 12-118 LFG/KBM, 2012 WL 10028647, at *2 (D.N.M. June 20, 2012); *N. Mariana Islands v. United States*, 2009 WL 596986, at *1 (D.D.C. Mar. 6, 2009); *Triad Int’l Maint. Corp. v. S. Air Transp., Inc.*, 2005 WL 1917512, at *1–2 (S.D. Ohio Aug. 10, 2005); *Kinkel v. Cingular Wireless*, 2006 Ill. LEXIS 1, at *2 (Ill. Jan. 11, 2006); *see also* Anthony J. Franze & R. Reeves Anderson, *Justices Are Paying More Attention to Amicus Briefs*, NAT’L L. JOURNAL (Sept. 3, 2014), <http://www.nationallawjournal.com/printerfriendly/id=1202668846551> (discussing Justices’ views on amicus briefs).

be of considerable help to the Court. An *amicus curiae* brief that does not serve this purpose burdens the Court, and its filing is not favored.¹⁷¹

The rule's emphases on "relevant matter" and "help" suggest that the Court is looking for factual and/or policy expertise. In practice, however, the Court liberally permits *amicus* brief filings,¹⁷² many of which are more in the nature of petitions or votes for one side or the other. But in an effort to perhaps better assess the credibility of the *amicus curiae* effort, the rule also requires disclosure of any connections to a party:

Except for briefs presented on behalf of *amicus curiae* listed in Rule 37.4 [federal, state or local governments], a brief filed under this Rule shall indicate whether counsel for a party authored the brief in whole or in part and whether such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief, and shall identify every person other than the *amicus curiae*, its members, or its counsel, who made such a monetary contribution.¹⁷³

This subsection, amended in 1997,¹⁷⁴ has not slowed the growth of *amicus* brief filings.

The Court will sometimes consider arguments raised for the first time by *amici curiae*. In 1998, this practice prompted a D.C. Circuit judge to express his disagreement with a Supreme Court decision remanding the case to the circuit court on the basis of arguments raised only by *amicus curiae*:

What is so remarkable about the Court's decision to vacate our decision and remand . . . is that the linchpin of the Court's decision is an argument—pressed by an *amicus curiae* (ostensibly, as a jurisdictional objection)—upon which the FEC did not rely in declining to

171. SUP. CT. R. 37.1.

172. See *supra* notes 49–55 and accompanying text.

173. SUP. CT. R. 37.6; see 1AA WEST'S FED. FORMS § 438 cmt. 257–58 (1998). ("Rule 37.6 militates strongly against the covering up or masking of sources of views which are being placed before the Court in *amicus curiae* briefs. In the past it has been in no way unusual for parties to a case to stir up *amicus* support and to undertake to bear the monetary costs which the *amicus* would otherwise find it necessary to pay for having a brief prepared and filed. Likewise, it has not been unusual for a party to say to the prospective *amicus* that the party would be glad to have the party's lawyers prepare a draft of an *amicus* brief which the *amicus* can then file in its own name. Rule 37.6 does not outlaw such practices. But it requires that the facts be disclosed, so that the Court will have information helpful in assessing the credibility to be attached to the views submitted by the *amicus*.").

174. *Id.*, amended by Act of May 1, 1997, ___ U.S.C.S. SUP. CT. R. 37.6; see Steven Finell, *Appellate Rules and Statutes Focus: Amendments to the Federal Rules of Appellate Procedure*, 28 APP. PRAC. J. 4, 5 (2009).

bring enforcement proceedings . . . , and which therefore forms no part of the agency decision that the district court, we, and the Supreme Court reviewed . . . I recognize that the Supreme Court has moved pretty far from traditional notions of judicial restraint that confine courts to issues presented by the parties, but I think this decision represents another large step in that regrettable process.¹⁷⁵

There are other instances of the Supreme Court deciding cases based on issues raised by *amici curiae*.¹⁷⁶ Yet other Supreme Court cases hold that the Court will not consider arguments raised only by *amici curiae*. As one recent opinion put it, "Because this argument was not raised by the parties or passed on by the lower courts, we do not consider it."¹⁷⁷ In the Supreme Court, therefore, precedent is mixed.

In the early 1950s, Justice Felix Frankfurter and Justice Hugo Black differed on how restrictive the *amicus curiae* rules should be, with Justice Black's view ultimately prevailing.¹⁷⁸ Decades later, Justice Antonin Scalia commented in one case on the lopsided, and what he perceived as self-interested, participation of *amicus curiae*. Dissenting from the Court's decision establishing a psychotherapist-patient privilege, he wrote:

In its consideration of this case, the Court was the beneficiary of no fewer than 14 *amicus* briefs supporting respondents, most of which came from such organizations as the American Psychiatric Association, the American Psychoanalytic Association, the American Association of State Social Work Boards, the Employee Assistance Professionals Association, Inc., the American Counseling Association, and the National Association of Social Workers. Not a single *amicus curiae* brief was filed in support of petitioner. That is no surprise. There is no self-interested organization out there devoted to pursuit of the truth in the federal courts.¹⁷⁹

175. *Akins v. Fed. Election Comm'n*, 146 F.3d 1049 (D.C. Cir. 1998).

176. In *Mapp v. Ohio*, the Court applied the exclusionary rule at the suggestion of *amicus*: "Other issues have been raised on this appeal but, in the view we have taken of the case, they need not be decided. Although appellant chose to urge what may have appeared to be the surer ground for favorable disposition and did not insist that *Wolf* be overruled, the *amicus curiae*, who was also permitted to participate in the oral argument, did urge the Court to overrule *Wolf*." 367 U.S. 643, 646 n.3 (1961); see also *Teague v. Lane*, 489 U.S. 288, 300 (1988) (addressing the question of retroactivity of habeas petitioner's claim despite the fact that the retroactivity issue was raised only in an *amicus* brief).

177. *FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. ___, ___, 133 S. Ct. 1003, 1011 & n.4 (2013) (citing *United Parcel Serv., Inc. v. Mitchell*, 451 U.S. 56, 60 n.2 (1981)).

178. *Krislov*, *supra* note 4, at 714-15; *Caldeira & Wright*, *supra* note 24, at 784-85.

179. *Jaffee v. Redmond*, 518 U.S. 1, 35-36 (1996) (Scalia, J., dissenting).

As with many matters, and as these instances suggest, the views of individual Justices on amicus curiae participation are not likely uniform.

2. Federal Courts of Appeals

As in the Supreme Court, an amicus brief may be filed in a federal court of appeals with the consent of the parties or by permission of the court.¹⁸⁰ The rule also requires the kind of disclosure required in the Supreme Court.¹⁸¹ But the appellate court rule requires the would-be amicus curiae to show not only its interest and why a brief is desirable, but also “why the matters asserted are relevant to the disposition of the case.”¹⁸² The comments to this subsection state, “Because the relevance of the matters asserted by an amicus is ordinarily the most compelling reason for granting leave to file, the Committee believes that it is helpful to

180. FED. R. APP. P. 29 provides in part:

(a) **When Permitted.** The United States or its officer or agency or a state may file an amicus-curiae brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing.

(b) **Motion for Leave to File.** The motion 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.

(c) **Contents and Form.** . . . An amicus brief . . . must include the following:

(1) if the amicus curiae is a corporation, a disclosure statement like that required of parties by Rule 26.1; . . .
(5) unless the amicus curiae is one listed in the first sentence of Rule 29(a), a statement that indicates whether:

(A) a party's counsel authored the brief in whole or in part;
(B) a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and
(C) a person—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person.

181. Compare SUP. CT. R. 37.6 (requiring disclosure of “whether counsel for a party authored the brief in whole or in part, and whether such counsel or a party made a monetary contribution intended to fund the preparations or submission of the brief” and disclosure of the identity of “every person other than the *amicus curiae*, its members, or its counsel, who made such a monetary contribution”), with FED. R. APP. P. 29(c)(5) (requiring an indication of “whether: (A) a party's counsel authored the brief in whole or in part; (B) a party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and (C) a person—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person . . .”).

182. FED. R. APP. P. 29(b)(2).

explicitly require such a showing.”¹⁸³ Other than singling out the government for favored status as an *amicus curiae*—as in all jurisdictions—the rule does not distinguish between the different types of *amicus curiae*.

Aside from the rule and comments, the federal courts of appeals—with a few notable exceptions—have not said much about the desirability or undesirability of *amicus* briefs.¹⁸⁴ The lower federal courts have not always adopted the Supreme Court’s open door policy, and occasionally a strong dissent is lodged.¹⁸⁵ In one case, Judge Patrick Higginbotham of the United States Court of Appeals for the Third Circuit dissented from the denial of a motion by a group of law professors to file an *amicus* brief, and his principle argument was that the courts should welcome assistance that could help them avoid error.¹⁸⁶ Similarly, the Ninth Circuit once commented, in rejecting an argument against *amicus* briefs,

These amici . . . take a legal position and present legal arguments in support of it, a perfectly permissible role for an *amicus*. See *Miller-Wohl Co. v. Commissioner of Labor & Industry*, 694 F.2d 203, 204 (9th Cir. 1982) (amici fulfill the classic role of *amicus curiae* by assisting in a case of general public interest, supplementing the assisting in a case of general public interest, supplementing the efforts of counsel, and drawing the court’s attention to law that might otherwise escape consideration). Moreover, we have stated that there is no rule that amici must be totally disinterested.¹⁸⁷

The Ninth Circuit also stressed the difference between amici *curiae* and parties in another case, denying an *amicus curiae* request for attorneys’ fees.¹⁸⁸ The court determined that amici *curiae* appointed by the court (Invited Friends, although the court did not use that term) could be paid for their efforts by the court, but otherwise amici *curiae* were “volunteers, not appointees.”¹⁸⁹

183. *Id.* Advisory Committee’s Notes.

184. Interestingly, federal judges themselves are not always allowed to appear as an *amicus curiae*. *Boumediene v. Bush*, 476 F.3d 934, 934 (D.C. Cir. 2006) (denying the unopposed motion of retired federal jurists for leave to file amici in support of the petitioners regarding the Military Commissions Act of 2006).

185. See *id.* at 935 (Rogers, J., dissenting); see also *Am. Coll. of Obstetricians and Gynecologists v. Thornburgh*, 699 F.2d 644, 645 (3d Cir. 1983) (Higginbotham, J., dissenting).

186. *Thornburgh*, 699 F.2d at 645.

187. *Funbus Sys., Inc. v. Cal. Pub. Utils. Comm’n*, 801 F.2d 1120, 1125 (9th Cir. 1986).

188. *Miller-Wohl Co. v. Comm’r of Labor & Indus.*, 649 F.2d 203, 204–05 (9th Cir. 1982).

189. *Id.* at 205.

Yet, because amicus briefs may be filed in federal court with the agreement of the parties¹⁹⁰ and therefore escape any published judicial commentary on their usefulness or desirability, it is difficult to be certain of judicial attitudes overall.¹⁹¹

A few federal judges have strong views about amicus briefs. Judge Posner's restrictive preferences are widely known. He once explained his reasons for denying an amicus brief, relying in part on the word "friend":

After 16 years of reading amicus curiae briefs the vast majority of which have not assisted the judges, I have decided that it would be good to scrutinize these motions in a more careful, indeed a fish-eyed, fashion.

The vast majority of amicus curiae briefs 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. Such amicus briefs should not be allowed. They are an abuse. The term "*amicus curiae*" means *friend of the court, not friend of a party*. We are beyond the original meaning now; an adversary role of an amicus curiae has become accepted. But there are, or at least there should be, limits.¹⁹²

Judge Posner opined that amicus briefs should only be allowed

when a party is not represented competently or is not represented at all, when the amicus has an interest in some other case that may be affected by the decision in the present case (though not enough affected to entitle the amicus to intervene and become a party in the present case), or when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.¹⁹³

Judge Posner's definition of amicus curiae would thus include the Near Intervenor, but exclude the most common type of amicus curiae—the Friend of a Party—unless that friend had unique information or perspective.¹⁹⁴ In a 2003 case, Judge Posner, as Chief

190. FED. R. APP. 29(a).

191. See, e.g., Gidiere, *supra* note 62, at 1–2; Kearney & Merrill, *supra* note 15, at 745–46 (explaining the varying judicial opinions on the importance of amicus curiae briefs and noting the lack of judicial consensus on their role).

192. Ryan v. Commodity Futures Trading Comm'n, 125 F.3d 1062, 1063 (7th Cir. 1997) (citations omitted) (emphasis added).

193. *Id.*

194. This hostility toward Friend of the Party amicus is also reflected in *Sierra Club, Inc. v. EPA*, 358 F.3d 516, 518 (7th Cir. 2004):

The Chamber does not have "an interest relating to the property or transaction which is the subject of the action"; its concern is not a *legal* "interest" (the permit at stake affects only one power plant) but a political or program-

Judge for the Seventh Circuit, denied permission for state legislators to file an amicus brief on the validity of a state statute.¹⁹⁵ Judge Posner reasoned that the legislators did not represent the state itself, and "[t]he fact that powerful public officials or business or labor organizations support or oppose an appeal is a datum that is irrelevant to judicial decision making, except in a few cases, of which this not one, in which the position of a nonparty has legal significance."¹⁹⁶

Judge Posner's views found opposition from then-Third Circuit Judge Samuel Alito, who explained that while traditional definitions of amicus curiae included the term "impartial," the current rule¹⁹⁷ required that the amicus have an "interest" in the litigation and that such an interest—even a pecuniary interest—was not inconsistent with the role of assisting the court in an adversary process.¹⁹⁸ Moreover, Judge Alito noted that "the time required for skeptical scrutiny of proposed amicus briefs may equal, if not exceed, the time that would have been needed to study the briefs at the merits stage if leave had been granted."¹⁹⁹ Screening is just not worth the effort. Under this view, amicus curiae participation need not be policed, no matter what type of amicus curiae is involved.

Most federal appellate judges are not concerned about amicus curiae abuse. The rate of amicus curiae participation is actually not great. Then-Judge Alito pointed out that amicus curiae were hardly overwhelming the courts of appeals. He noted that less than 10% of cases that resulted in opinions (in itself a small portion of the total number of cases) had even one amicus brief filed.²⁰⁰ A survey of federal appellate judges showed that around

matic one: the Chamber favors more business and less environmental regulation. That does not justify intervention. Indeed, it does not necessarily justify even a filing as *amicus curiae*. Courts value submissions not to see how the interest groups line up, but to learn about facts and legal perspectives that the litigants have not adequately developed.

195. *Voices for Choices v. Ill. Bell Tel. Co.*, 339 F.3d 542, 543–46 (7th Cir. 2003).

196. *Id.* at 545.

197. FED. R. APP. 29.

198. *Neonatology Assocs. v. Comm'r*, 293 F.3d 128, 131 (3d Cir. 2002).

199. *Id.* at 133; *see also* *Boumediene v. Bush*, 476 F.3d 934, 934 (D.C. Cir. 2006) (rejecting an amicus brief by retired federal judges).

200. *Neonatology Assocs.*, 293 F.3d at 133 n.2 ("During the past year, private amici were listed as appearing in fewer than 10% of our court's opinions in the *Federal Reporter*. And since (a) the great majority of our cases are decided without such opinions and (b) amici are much more likely in the sort of cases that do result in *Federal Reporter* opinions, the percentage of all of our cases in which private amici appear or seek to appear is plainly

80% believed that amicus briefs were filed in 5% or less of their cases.²⁰¹ Only twelve circuit court judges believed that 15% or more of their cases involved amicus curiae.²⁰²

3. State Courts

All state courts allow amicus briefs in their courts of last resort. Many state court rules or statutes are modeled after Rule 37 of the Rules of the Supreme Court or Rule 29 of the Federal Rules of Appellate Procedure.²⁰³ But the state rules vary in ways that show different visions and concerns about amicus briefs. For the most part, the rules are relaxed and do not distinguish between types of friends, but there are a few exceptions.

A person or group receives permission to file an amicus brief when appointed at the court's request, when all parties consent, or when the person or group's motion to file a brief is granted.²⁰⁴ All three routes to permission can be followed in the federal courts. In the state courts, around fifteen states allow amicus curiae to file with the consent of the parties or by court permission,²⁰⁵ but most refer only to the permission or leave of the court.²⁰⁶ In Georgia, Pennsylvania, and Texas, the rules appear to give amicus curiae the right to file a brief without advance permission, although the Texas court can refuse the brief "for good cause shown."²⁰⁷ Regardless of what the rules say, courts always retain inherent power to appoint amicus curiae.

For applicants who must seek permission by motion to appear as amicus curiae, the rules are mostly general about the necessary showing. The most common statement of the applicant's showing is borrowed from Rule 29 of the Federal Rules of the Appellate Procedure, that the motion must "identify the interest of

only a small fraction of 10%.").

201. Simard, *supra* note 3, at 686.

202. *Id.* at 686–87.

203. See *infra* note 208 and accompanying text.

204. See *infra* notes 205–07.

205. See ALASKA R. APP. P. 212(a)(9); ARIZ. R. CIV. APP. P. 16(a); IOWA R. APP. P. 6.906(1); ME. R. APP. P. 9(e)(1); MO. SUP. CT. R. 84.05(f); NEV. R. APP. P. 29(a); N.H. SUP. CT. R. 30(1); OHIO APP. R. 17; OKLA. SUP. CT. R. 1.12(a); R.I. SUP. CT. R. 16(h); VT. R. APP. P. 29(a); VA. SUP. CT. R. 5:30(b)(2); WASH. R. APP. P. 10.6(a); W. VA. R. APP. P. 30(a).

206. See, e.g., CAL. R. CT. 8.520(f); COLO. APP. R. 29; DEL. SUP. CT. R. 28(a); MASS. R. APP. P. 17; TENN. R. APP. P. 31(a).

207. GA. SUP. CT. R. 23; PENN. R. APP. P. 531(a); TEX. R. APP. P. 11.

the applicant, and shall state the reasons why the brief of an amicus curiae is desirable."²⁰⁸ A few states add criteria to these required showings such as stating "why the matters asserted are relevant to the disposition of the case"²⁰⁹ or "that the applicant has read the relevant brief, petition or motion."²¹⁰ A number of states provide no required showing in their court rule,²¹¹ although court decisions in those states may limit amicus curiae participation.²¹²

Some states require more specificity in the application about the issues to be addressed. Examples of what court rules require a petitioner to state include: matters of fact or law that might otherwise escape the court's attention;²¹³ facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties and their relevancy to the disposition of the case;²¹⁴ facts or questions of law which may not be presented adequately by the litigants;²¹⁵ and specific issues to which the amicus curiae brief will be directed, and an applicant's reason for believing that additional argument is necessary on these specific issues.²¹⁶ These rules suggest an effort to discourage "me too" Friend of a Party briefs.

A few states require additional information about the applicant's interest in the case, in what seems to be an effort to tease out the private and public interests involved. Minnesota, for example, seeks to know whether the interest is public or private.²¹⁷ New Jersey asks to know the issue to be addressed, "the nature of the public interest therein and the nature of the applicant's spe-

208. ALA. R. APP. P. 29; ALASKA R. APP. P. 212(9); COLO. APP. R. 29; ME. R. APP. P. 9 (e)(1); MASS. R. APP. P. 17; OHIO APP. R. 17; R.I. SUP. CT. R. 16(h); S.C. APP. CT. R. 213; S.D. CODIFIED LAWS § 15-26A-74 (2014); *see also* CONN. PRACTICE BOOK § 67-7 (2014 ed.); NEV. R. APP. P. 29(c); UTAH R. APP. P. 25; VT. R. APP. P. 29(b); WIS. STAT. ANN. § 809.19(7) (West 2014) (with very slight modifications of the text).

209. DEL. S. CT. R. 28(b)(2); N.D. R. APP. P. 29(b)(2); W.VA. R. APP. P. 30(c).

210. ARIZ. R. CIV. APP. P. 16(a).

211. *See* HAW. R. APP. P. 28(g); KAN. SUP. CT. R. 6.06; NEB. CT. R. APP. P. § 2-109; PA. R. APP. P. 531; VA. SUP. CT. R. 5:30.

212. *See, e.g., In re Scheidmantel*, 868 A.2d 464, 478 (Pa. Super. Ct. 2005) ("An *amicus curiae* is not a party and cannot raise issues which have not been preserved and raised by the parties themselves.").

213. LA. SUP. CT. R. 7:12; *see* MISS. R. APP. P. 29(a).

214. MO. SUP. CT. R. 84.05(f); N.H. SUP. CT. R. 30(2).

215. OKLA. SUP. CT. R. 1.12(b)(2).

216. WASH. R. APP. P. 10.6(b)(3), (4).

217. MINN. R. CIV. APP. P. 129.01.

cial interest, involvement or expertise in respect thereof.”²¹⁸ Oregon asks the applicant to explain whether it “intends to present a private interest of its own, or to present a position as to the correct rule of law that does not affect a private interest of its own.”²¹⁹ But these rules do not suggest that a private interest disqualifies an application for *amicus curiae* status. They do not actually articulate a distinction between the Near Intervenor and the Friend of a Party *amicus curiae*, but come close.

A few states set forth a more restrictive list of criteria.²²⁰ The Mississippi and Louisiana rules require would-be *amicus curiae* to show:

- (1) *amicus* has an interest in some other case involving a similar question; or (2) counsel for a party is inadequate or the brief insufficient; or (3) there are matters of fact or law that may otherwise escape the court’s attention; or (4) the *amicus* has substantial legitimate interests that will likely be affected by the outcome of the case and which interests will not be adequately protected by those already parties to the case.²²¹

The Wyoming rule requires a similar showing, except that the factors are joined by “and” rather than “or”:

- (1) the movant’s interest in the issues raised in the case;
- (2) the reasons an *amicus* brief is appropriate and desirable;
- (3) the view of the movant with respect to whether a party is not represented competently or is not represented at all;
- (4) the interest of the *amicus* in some other case that may be affected by the decision in the case before the court; *and*
- (5) any unique information or perspective the *amicus* has that can be of assistance to the court beyond that the lawyers for the parties can provide.²²²

A number of state courts, like the Supreme Court of the United States, require disclosure of financial or other ties to the parties. For example, the comments to the Arizona rules state that *amici curiae* should “identify every person or entity, other than the *amicus curiae*, its members, or its counsel, who made a monetary contribution to the preparation or submission of the brief.”²²³ Cali-

218. N.J. GEN. R. 1:13-9(a).

219. ORE. R. APP. P. 8.15(1).

220. These criteria have been in use for some time in other contexts. *See, e.g.*, *Ryan v. Commodity Futures Trading Comm’n*, 125 F.3d 1062, 1063 (7th Cir. 1997).

221. MISS. R. APP. P. 29; LA. SUP. CT. R. 7.

222. WYO. R. APP. P. 7.12(b) (emphasis added).

223. ARIZ. R. CIV. APP. P. 16, cmt., *amended by* 2014 Ariz. Ct. Order 0033 (effective Jan. 1, 2015).

fornia requires amici to disclose any party or counsel for a party who authored all or part of the brief, and every person—including parties or parties' counsel—who made a financial contribution to the preparation of the brief.²²⁴ Connecticut, Maryland, Minnesota, North Dakota, Texas, and West Virginia require similar disclosure.²²⁵ Such disclosure may unmask the party in amicus curiae disguise, or at least diminish the credibility of a paid supporter.

Even states with rules that do not explicitly require disclosure of financial support or ties to a party may expect such disclosure by amicus applicants. Massachusetts, which does not include such disclosure requirements in its rule, has such a requirement by case law.²²⁶ The court noted that because the rule required an amicus curiae to "identify its interest," the authors of an amicus brief should have disclosed that the law firm representing amicus curiae was also representing one of the parties in another case with similar issues.²²⁷ Many states have language similar to the Massachusetts rule,²²⁸ and one could argue that the Supreme Judicial Court of Massachusetts' broad reading of "interest" should apply to those states. But parties who are funding amicus curiae briefs, or parties' counsel who are writing amicus briefs, are unlikely to read the language that way.

Arizona goes further than most states in requiring not only financial disclosure, but also that "[c]ounsel for a party should not be permitted to write the amicus brief in whole or in part."²²⁹ Arizona's rules and comments suggest suspicion of amicus curiae—a suspicion that not all have friendly intentions—and a belief that amicus curiae should be helpful to the court "[a]s the name implies."²³⁰

Just as state court rules for amicus curiae vary, state court judges have expressed varying views on the merits of amicus par-

224. CAL. R. CT. 8.520(f)(4).

225. CONN. PRACTICE BOOK § 67-7 (2014 ed.); MD. R. 8-511(b)(1)(E); MINN. R. CIV. APP. P. 129.03; N.D. R. APP. P. 29(c)(4); TEX. R. APP. P. 11; W. VA. R. APP. P. 30(e)(5).

226. Compare MASS. R. APP. P. 17, (containing no disclosure requirement), with *Aspinall v. Phillip Morris Cos., Inc.*, 813 N.E.2d 476, 480 n.8 (Mass. 2004) ("A full and honest disclosure of the interest of amici is crucial to the fairness and integrity of the appellate process . . . [W]e now interpret Rule 17 [of the Massachusetts Rules of Appellate Procedure] to require this making the disclosure.").

227. See *Aspinall*, 813 N.E. 2d at 480 n.8.

228. See *supra* note 208.

229. ARIZ. R. CIV. APP. P. 16, cmt.

230. *Id.*

ticipation. Like Judge Posner, a few state courts appear to be hostile to the Friend of the Party amicus and recur to the meaning of “friend of the court.”²³¹ For example, the comments to Arizona Rule 16 state, “As the name implies, an amicus curiae brief should assist the Court, not advocate a particular litigant’s case.”²³² More commonly, states stress that the function of an amicus curiae is to assist the court, not a party, although they acknowledge “the reality that most amicus briefs are in fact a type of adversary intervention rather than objective assistance to the court.”²³³ Several Illinois cases state that an amicus curiae is not a party to the action but is, instead, a friend of the court. Accordingly, its “sole function [as] an *amicus* is to advise or to make suggestions to the court.”²³⁴ These comments show the courts referring back to the meaning of the term amicus as “friend” in their attempts to limit or shape amicus curiae participation.

Some states express concern about persons or groups masquerading as amicus curiae when they actually have an interest in the outcome of litigation or close ties to one of the parties. As one Massachusetts opinion put it: “Briefs of amicus curiae are intended to represent the views of *non*-parties; they are not intended as vehicles for parties or their counsel to make additional arguments beyond those that fit within the page constraints of their briefs.”²³⁵ Similarly, the comments to Rule 129.01 of the Minnesota Rules of Civil Appellate Procedure state that “[t]his rule is intended to encourage the participation of independent amici, and to prevent the courts from being misled about the independence of amici or being exposed to ‘a mirage of amicus support that really emanates from the petitioner’s word processor.’”²³⁶

One way to prevent parties from appearing in amicus curiae clothing is to require a certification of independence or financial

231. See, e.g., *Ryan v. Commodity Futures Trading Comm’n*, 125 F.3d 1062, 1063 (7th Cir. 1997); *Gabriel Tech. Corp., v. Qualcomm Inc.*, 2012 WL 849167, at *4 (S.D. Cal. Mar. 1, 2012).

232. ARIZ. R. CIV. APP. P. 16, cmt. (emphasis added).

233. ALA. R. APP. P. 29, cmt.; TENN. R. APP. P. 31, cmt.

234. See, e.g., *In re J.W.*, 787 N.E.2d 747, 760–61 (Ill. 2003); *Burger v. Lutheran Gen. Hosp.*, 759 N.E.2d 533, 557 (Ill. 2001).

235. *Aspinall v. Philip Morris Cos., Inc.*, 813 N.E.2d 476, 480–81 n.8 (Mass. 2004).

236. MINN. R. APP. P. 129.01 Advisory Committee Comments (2000 Amendments); see also Stephen M. Shapiro, *Certiorari Practice: The Supreme Court’s Shrinking Docket*, MAYER BROWN (1999), <http://appellate.net/articles/certpractice.asp> (last visited Nov. 24, 2014) (arguing that amicus briefs should not mislead courts, but rather add relevant information and reflect an independent perspective).

disclosure. Only a minority of states require the kind of disclosure of financial ties to the parties that is required in the Supreme Court.²³⁷ Requiring disclosure and/or certification would do much to expose this type of abuse, if not curb it altogether.²³⁸

Some states use the *amicus curiae* status as a way to allow a Near Intervenor to be heard, although courts do not seem to recognize that the Near Intervenor *amicus* is very different from the Friend of a Party interest group.²³⁹ A New Jersey case suggests that crime victims, while lacking standing to intervene on appeal from defendant's conviction, might be able to file an *amicus* brief.²⁴⁰ A New York court allowed a citizens group seeking to intervene in a case involving a town's authority to ban hydrofracking to participate as *amicus curiae*, but not to intervene.²⁴¹ Some state rules contemplate that *amicus curiae* might be a person or a group likely to be affected by the outcome, but not so affected that they have standing as a party.²⁴² These rules

237. SUP. CT. R. 37.6 provides:

Except for briefs presented on behalf of *amicus curiae* listed in Rule 37.4, a brief filed under this Rule shall indicate whether counsel for a party authored the brief in whole or in part and whether such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief, and shall identify every person other than the *amicus curiae*, its members, or its counsel, who made such a monetary contribution. The disclosure shall be made in the first footnote on the first page of text.

A number of states also require some disclosure of financial support and/or authorship. ARIZ. R. CIV. APP. P. 16, cmt.; CAL. R. CT. 8.520(f)(4); CONN. PRACTICE BOOK § 67-7 (2014 ed.); ID. APP. R. 8; MD. R. 8-511(b); MINN. R. CIV. APP. P. 129.01; N.D. R. APP. P. 29(c); TEX. R. APP. P. 11; W. VA. R. APP. P. 30(e); see *Aspinall*, 813 N.E.2d at 480–81 n.8.

238. Deterrence was certainly the hope behind the federal disclosure requirement.

The disclosure requirement, which is modeled on Supreme Court Rule 37.6, serves to deter counsel from using an *amicus curiae* brief to circumvent page limits on the parties' briefs. See *Glassroth v. Moore*, 347 F.3d 916, 919 (11th Cir. 2003) (noting the majority's suspicion "that *amicus* briefs are often used as a means of evading the page limitations on a party's briefs"). It also may help judges to assess whether the *amicus* itself considers the issue important enough to sustain the cost and effort of filing an *amicus* brief.

FED. R. APP. P. 29, Advisory Committee Notes—2010 Amendments; see SUP. CT. R. 37.6.

239. See *infra* notes 240–43.

240. *State v. Tedesco*, 69 A.3d 103, 109 (N.J. 2013).

241. "Here, although members of [the citizens group] submitted affidavits identifying effects that hydrofracking may have on their daily lives, these claimed impacts were largely speculative and failed to demonstrate a substantial interest in the outcome of the action different from other residents of the Town." *Norse Energy Corp. USA v. Town of Dryden*, 964 N.Y.S.2d 714, 718 (N.Y. App. Div. 2013), *leave to appeal granted*, 2013-604, 2013 WL 4562930 (N.Y. Aug. 29, 2013).

242. 41 MASS. PRAC. SERIES, APP. P. § 5:26. This Near Intervenor *amicus curiae* is also implied in Judge Posner's suggested factors for *amicus*, and has been a part of *amicus curiae* definitions for some time. See *Voices for Choices v. Ill. Bell Tel. Co.*, 339 F.3d 542, 545

might allow *amicus curiae* status, for example, if the would-be *amicus curiae* has “substantial, legitimate interests that will likely be affected by the outcome of the case and which interests will not be adequately protected by those already party to the case.”²⁴³

But in other states, *amicus curiae* status is denied precisely because a party is too close to intervenor status, and has no new information or perspective to offer.²⁴⁴ In these states, the concept of *amicus curiae* as a friend to the court means that near intervenors will not probably qualify as *amicus*.²⁴⁵ For example, a Delaware court denied both intervenor and *amicus curiae* status to a member of the class otherwise represented in the class action.²⁴⁶ Stressing that the court did not need such *amicus curiae* assistance in the particular case because the parties were well-represented, and the would-be *amicus curiae* had no new information or perspective to offer, the court said,

[Applicant's] interest in these proceedings, as set forth in its motion, is not objective, unique, or related to a question of general public importance. Rather, [applicant's] interest is specific to its status as a class member. To the extent that this case involves any issues of general public importance, [applicant] has not indicated why those issues will not be adequately addressed by the attorneys for the parties. Consequently, the record does not reflect that this is a case in which the Court would benefit by additional assistance from [applicant].²⁴⁷

Thus, sometimes *amici curiae* and intervenors are seen as being at the opposite ends of a spectrum of direct involvement in the case: *amici curiae* should be disinterested friends of the court, while intervenors must have sufficient interest in the dispute to be a party. Yet at other times, *amicus curiae* and intervenors are seen as divided by a thin line: one who falls just short of that line may not have sufficient interest to intervene but may file an *amicus curiae* brief.²⁴⁸ These different conceptions are not acknowledged or analyzed as such—all are subsumed under the idea of “friend of the court.”

(7th Cir. 2003).

243. LA. SUP. CT. R. 7-12; MISS. R. APP. P. 29(a). Yet, a Mississippi court has interpreted this rule narrowly, denying *amicus* status to a realtor's association that failed to “comply with [this] criteria.” *Taylor v. Roberts*, 475 So. 2d 150, 151–52 (Miss. 1985).

244. *Accord Giammalvo v. Sunshine Mining Co.*, 644 A.2d 407, 410 (Del. 1994).

245. *See id.*

246. *Id.*

247. *Id.*

248. *See supra* notes 193–98 and accompanying text.

It may be that courts are not bothered by the inconsistencies resulting from having amicus curiae cover such different roles because courts can simply disregard troublesome or unhelpful amici curiae.²⁴⁹ A study in 2006 surveyed the chief judge/justice and appellate court clerk of every state court of last resort as to the usefulness of amicus briefs. It found that most respondents are “moderately supportive” of amicus curiae and that they estimated amicus briefs to be useful 25% to 75% of the time.²⁵⁰ These judges believed amicus briefs were most useful when articulating policy considerations or social science evidence.²⁵¹ And regardless of the level of amicus curiae participation in their state, these judges and clerks were satisfied with that level of participation.²⁵² The survey results suggest that while judges may occasionally be irritated by what they perceive as unhelpful amicus curiae, on the whole they are happy to read (or at least skim) the additional briefs. The survey also suggests that while courts might prefer a certain type of amicus curiae contribution, they do not wish to tightly constrain these friends or put up a bouncer and velvet rope at the courthouse door.

Two articles discussed amicus curiae participation in single states, both of which are considered to have high levels of amicus briefing. One article surveyed Florida judges on the usefulness of amicus briefs. Some of the judges complained that “too many are meaningless vanity efforts,” or “just an echo” of the party brief.²⁵³ The chief judge at the time had adopted Judge Posner’s view that amicus briefs should be screened carefully for usefulness.²⁵⁴ But in practice the Florida courts admitted amicus briefs without great scrutiny.²⁵⁵ Moreover, the article’s survey of cases showed that amicus curiae had often influenced decisions.²⁵⁶ Similarly, an arti-

249. Krislov referred to the amicus brief’s “delusive innocuousness, its seemingly static function and terminology, taken together with the offhand manner of its usual use in court” Krislov, *supra* note 4, at 694.

250. Corbally, Bross, & Flango, *supra* note 64, at 185 (“27 percent of the justices regarded fewer than a quarter influential, 32 percent considered between a quarter and one half influential, and 36 percent considered between one half and three quarters influential.”).

251. *See id.*

252. *See id.* at 187.

253. Walbolt & Lang, *supra* note 60, at 277.

254. *Cf. id.* at 298 (noting Florida courts’ general allowance of amicus briefs notwithstanding opposition).

255. *See id.*

256. *See id.* at 299–300.

cle about amicus curiae in the New York Court of Appeals concluded that amicus participation had increased in recent decades and that these briefs did have some effect on the disposition of cases.²⁵⁷ But unlike Florida's chief judge, the New York Court of Appeals sought to increase amicus curiae participation.²⁵⁸

IV. THE LIMITS OF FRIENDSHIP: TOWARD A CLEARER UNDERSTANDING OF THE ROLE OF AMICUS

As the foregoing section shows, there is something curious about the way amici curiae are so lightly regulated, allowed to wander into court at will, and potentially take control of cases at the expense of litigants who will actually be bound by the court's decision. Yet neither courts nor litigants seem particularly concerned about the amicus curiae role, even as it has expanded. There is the occasional exasperated judicial complaint about useless, duplicative, amicus briefs. Nevertheless, judges, by and large, seem to appreciate the option to consider amicus briefs, and neither litigants nor lawyers have organized in protest.

Of course, the fact that few seem alarmed does not mean that there is not a problem. The fact that courts and others have not clearly distinguished between the different types of amicus curiae—other than to give the state most-favored-amicus status—has led to some confusion and muddled reasoning. A recurring complaint about amicus curiae is that they may be merely paid helpers of a litigant.²⁵⁹ The credibility of all amicus curiae could be helped if all courts adopted at least the disclosure requirements of the federal courts. Courts worried about abuse by the “puppets of a party” could go as far as Arizona and forbid ghost-writing or funding of amicus briefs.²⁶⁰ More importantly, if amicus curiae practice continues to grow in courts other than the Supreme

257. Matthew Laroche, *Is the New York State Court of Appeals Still “Friendless?” An Empirical Study of Amicus Curiae Participation*, 72 ALB. L. REV. 701, 715, 725, 753 (2009).

258. See *id.* at 703 (“In December of 1988, the court even added a preamble to its weekly list of new filings which encourages the submission of amicus briefs.”).

259. See, e.g., David B. Smallman, *Amicus Practice: New Rules for Old Friends*, 25 LITIG. 25, 28–29 (1999) (describing compensated amici as one of the “perceived abuses in amicus practice” and noting how Texas has enacted a financial disclosure provision in its appellate rules to prevent such abuse). See also *supra* notes 103–05 and accompanying text.

260. See ARIZ. R. CIV. APP. P. 16, cmt. to 1998 Amendments.

Court of the United States,²⁶¹ courts and litigants should prepare for the challenges this expansion will present.

The lack of clarity about the different roles of *amicus curiae*, caused in part by the failure to distinguish between the various kinds of friends, will make it difficult for courts to deal effectively with an upsurge in *amicus curiae* participation that may be headed for the federal and state appellate courts. Rather than presiding over an unexamined transformation of appellate court decision-making in imitation of the Supreme Court, these courts should clarify the role and purpose of *amicus curiae*, as well as the role of an appellate court in resolving disputes. At present, there is general complacency about *amicus curiae* participation; a sense that more is probably better and the courts can competently separate the useful from the duplicative.²⁶² But with some clarity about the types and purposes of *amicus curiae*, courts might be in a better position to establish limits that could improve *amicus* participation and the resolution of disputes.

To clarify the role of *amicus curiae*, and especially the role of a Friend of a Party, courts need to address the myth of disinterest that is tied to the term “friend of the court.” The idea that *amicus curiae* should be impartial, despite a general recognition that most amici curiae are supporting a party, persists. Second, to understand what legitimate interests amici curiae may have, courts need to clarify their own role: Is a court decision more like a legislative decision so that courts should gather as many opinions, policy arguments, and factual inputs as possible? Or should they limit this kind of input, as democratic as it might be, out of deference to the parties who will be bound by the decision? Is a court’s primary purpose to “get the law right,” or is it to resolve a dispute?

A. *The Myth of Disinterest*

Although most modern judges admit that an *amicus curiae* will usually be partisan, the idea that *amicus* should be “disinterest-

261. There are indications that it will continue to grow. See Yeager, *supra* note 109.

262. See, e.g., Rebecca Haw, *Amicus Briefs and the Sherman Act: Why Antitrust Needs a New Deal*, 89 TEX. L. REV. 1247, 1249 (2011) (noting and critiquing the Court’s reliance on *amicus* briefs in antitrust cases). See also *supra* note 19.

ed" or at least not very partisan, persists. We see this idea in Judge Posner's writing and elsewhere.²⁶³ One judge stated that

[h]istorically, *amicus curiae* is an impartial individual who suggests the interpretation and status of the law, gives information concerning it, and advises the Court in order that justice may be done, rather than to advocate a point of view so that a cause may be won by one party or another."²⁶⁴

In fact, not too long ago, a complete lack of interest was seen as disqualifying an *amicus curiae* applicant. Law professors, for example, might see their *amicus curiae* efforts rebuffed, although now they are regular *amicus curiae* authors in the Supreme Court.²⁶⁵ In 1957, the solicitor general issued a policy on the consent to *amicus curiae* participation:

The Department of Justice frowns upon the filing by amici with *merely an academic interest* at one extreme, or those who merely wish to engage in propaganda on the other. Consent is given "where the applicant has a concrete, substantial interest in the decision of the case, and the proposed brief would assist the Court by presenting relevant arguments or materials which would not otherwise be submitted."²⁶⁶

Simply having an opinion, even a learned one, was not enough to merit *amicus curiae* participation.²⁶⁷

Those who, like Judge Posner, nevertheless harken back to a disinterest ideal seem to be saying that they want a true friend,

263. The Ninth Circuit countered this argument in *Funbus Sys., Inc. v. Cal. Pub. Utils. Comm'n.*, 801 F.2d 1120, 1124–25 (9th Cir. 1986) ("[W]e have stated that there is no rule that amici must be totally disinterested.").

264. *Cnty. Ass'n for Restoration of Env't (CARE) v. DeRuyter Bros. Dairy*, 54 F. Supp. 2d 974, 975 (E.D. Wash. 1999).

265. See Franze & Anderson, *supra* note 170 (noting the frequency with which Supreme Court Justices cite law professors' *amicus* briefs). See generally *Am. Coll. of Obstetricians & Gynecologists v. Thornburgh*, 699 F.2d 644, 645 (3d Cir. 1983) (rejecting law professors' *amicus* brief for lack of interest in the case).

266. Krislov, *supra* note 4, at 715 (emphasis added).

267. See *id.* This view was echoed by the United States Court of Appeals for the Third Circuit in 1983 when it rejected an *amicus* brief by law professors:

The law professors do not purport to represent any individual or organization with a legally cognizable interest in the subject matter at issue, and give only their concern about the manner in which this court will interpret the law as the basis for their brief. Since there is no indication that the parties to the law suit and those parties who have been granted leave to file a brief *amicus curiae* will not adequately present all relevant legal arguments, there is no persuasive reason to grant the motion.

Thornburgh, 699 F.2d at 645. Could it be that the rise of law professor briefs coincides with the rise of law professors who have been appellate clerks? In this light, the *amicus* brief is a continuation of the clerkship role.

one who will help the Court rather than try to influence it. Yet Judge Posner would also allow the Near Intervenor, who has a clear private interest in the dispute and who has historically been allowed to participate as *amicus curiae*.²⁶⁸ Those who claim to want disinterested *amicus curiae* are really saying they want limits on certain *amicus curiae*.

The issue seems less to be interest or lack of interest than the nature of that interest. The state and invited friends will certainly be interested, but the courts see those interests as presumably legitimate. The Court's Lawyer *amicus* is assigned an interest by the court.²⁶⁹ The Near Intervenor's interests are clear,²⁷⁰ and the *amicus curiae* avenue for expressing those interests seems reasonable. Friends of a Party, or Independent Friends, however, may have interests that the court finds intrusive or less relevant.²⁷¹ The court may be hostile to some of those interests, or the court may resent duplicative efforts on behalf of the parties.

One interesting example involves the role of *amicus curiae* in so-called death penalty "volunteer" cases, i.e., where a defendant sentenced to death refuses to appeal or otherwise challenge the sentence.²⁷² The Supreme Court of Connecticut rejected an *amicus* brief by a public defender association, reasoning that the court was not required to "grant a request to appear as *amicus curiae* if the parties to a proceeding have taken nonadversarial positions on an issue on which the person seeking to be admitted as an *amicus curiae* takes an opposing view."²⁷³ Yet the Supreme Court of South Dakota reached a contrary conclusion. The court appointed an attorney as *amicus curiae* to review the record and argue any potential issues when it became clear that the defendant's attorney had been instructed not to contest the sentence.²⁷⁴

268. See *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997).

269. See *Krislov*, *supra* note 4, at 720; see also *supra* Part II.B; *supra* notes 93–94.

270. See *supra* Part II.F; see also Justin Gunter, *Standards for Third-Party Intervenors: Distinguishing Between Public-Law and Private-Law Intervention*, 66 VAND. L. REV. 645, 657 (2013) (discussing Rule 24's requirement that proposed intervenors must claim an interest in the action).

271. For example, the United States Court of Appeals for the Second Circuit recently rejected an *amicus curiae* effort by attorneys representing the district court judge after the appellate court reassigned the case to another trial court judge for the appearance of fairness reasons. *Ligon v. City of New York*, 736 F.3d 166 (2d Cir. 2013).

272. *State v. Robert*, 820 N.W. 2d 136, 140–41 & n.7 (S.D. 2012).

273. *State v. Ross*, 863 A.2d 654, 674 (Conn. 2005).

274. *Robert*, 820 N.W. 2d at 141.

The court stated, "This Court is aware of society's interest in the constitutional imposition of the death penalty. This interest exists independent of the State's interest in punishing [defendant] for his crimes."²⁷⁵

On the one hand, the Supreme Court of Connecticut is surely correct that one who has no concrete stake in the outcome should not be allowed to interfere where the parties are in agreement. On the other hand, one historical function of *amicus curiae* was to prevent collusion by calling to the court's attention considerations that the parties would not collude.²⁷⁶ And of course, the death penalty is unique—the state has a particular interest in its fair administration. The death penalty volunteer cases seem like a paradigm example of appropriate *amicus curiae* participation, whether or not the *amicus* is perceived as having an "interest" in the outcome. These are perhaps ideal cases for Invited or Independent Friends.

Viewing the question of the *amicus curiae*'s interest in light of the different types of *amicus curiae* shows that "interest" becomes a problem for some courts and litigants primarily in the Friend of a Party category. The question then becomes not whether all *amicus curiae* should have an interest, but whether a Friend of a Party's (or Independent Friend's) interest is one that justifies *amicus curiae* participation. The answer to that question depends in part on how a court views its own job.

B. *Amicus Input and the Role of the Courts*

There was a time, we are told, when courts were expected only to apply the law, or to find it through an exercise in pure reason.²⁷⁷ Courts were not seen as making law.²⁷⁸ This caricature of

275. *Id.* (citation omitted).

276. See Krislov, *supra* note 4, at 695 (discussing the historical role of *amicus curiae* at common law as a method for calling attention to manifest error or existing statutes); see also *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1064 (7th Cir. 1997) (pointing out that the court is helped by *amici curiae* that bring to the court's attention matters that the parties have omitted).

277. Helen A. Anderson, *Legal Doubletalk and the Concern with Positional Conflicts: A "Foolish Consistency"?* 111 PENN. ST. L. REV. 1, 14 (2006).

278. *Id.* ("An early Nineteenth Century belief in natural law gave way to a classical view of law as the objective application of known principles. Thus, judges were viewed as constrained by rules, rules that could be determined correctly through reason.") (citing Elizabeth Mensch, *The History of Mainstream Legal Thought*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 19–26 (David Kairys ed., 1982)).

the judicial role may never have completely taken hold, yet nor has it ever been entirely expunged. It survives in the popular mind even today, as we see in the confirmation hearings for Supreme Court Justices.²⁷⁹ Few educated people today would argue that judges do not make law. It may be that the rise in amicus curiae involvement coincides with that recognition that courts engage in policymaking just as legislatures do.²⁸⁰

But to acknowledge that courts make the law is not to say that they should operate just as legislatures do, with the explicit involvement of interest groups. Courts still deal with the law one dispute at a time, with litigants who are bound by the decision, who shape the course of litigation by their tactical and strategic decisions, and who bear the costs of litigation. It is one thing to say that a court—especially a high court—should consider the impact of its decision in future cases. It is quite another to allow the litigants' voices to be almost drowned out by those of amici curiae.

Some might argue that certain kinds of cases need significant amicus curiae input. They might point to "public law [or interest] litigation"²⁸¹ such as school desegregation cases and claim that these are more like a legislative exercise, with many stakeholders whose voices need to be heard.²⁸² Even in these situations, however, those actually bound by the decision are represented in court and can receive tactical and financial support from allies. Moreover, it is hard to draw a clear line between the public and private dispute. A private dispute might be brought as a test case by an

279. At Chief Justice John Roberts' confirmation hearing, the judge compared himself to an umpire, calling balls and strikes. Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 59 (2005) (statement of John G. Roberts, Jr.) ("Judges are like umpires. Umpires don't make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules but it is a limited role. Nobody ever went to a ball game to see the umpire."). During Justice Sonia Sotomayor's nomination hearing, she pledged to simply apply the law, and not be moved by empathy. See Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 111th Cong. 59 (2009).

280. In fact, it is that recognition that prompted a call for New Zealand to allow amicus curiae participation. See Clark, *supra* note 7, at 71–73.

281. See generally Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270, 282 (1989) (introducing "public interest litigation" and explaining its design in vindicating "the ideological, political, or moral interests" of the public and attempting to ensure that public institutions behave lawfully).

282. *Id.* at 284, 331.

advocacy group in order to create favorable law.²⁸³ Or, a private case such as a custody dispute can take on public importance if it is seen as creating law for new domestic situations such as same-sex parent couples.²⁸⁴ The parties to the dispute, whose motives may be primarily private and personal, can find themselves the center of amicus curiae attention.

Some courts actively seek amicus curiae, especially when presented with what they perceive to be a novel question.²⁸⁵ Judges may like the assistance of amici curiae because it helps them feel more assured about their decision, that they are not missing something. It may also feed a sense of self-importance to know that other organizations are concerned with the decision. To the extent that concern inspires the court to do a careful job, that attention is not a bad thing. But can courts get carried away with the importance of their policymaking roles? Intermediate appellate courts, especially, should be concerned with error correction.²⁸⁶

A liberal amicus curiae approach is sometimes defended as necessary for democratic input into the courts.²⁸⁷ But that argument seems to prove too much. If it is the democratic input we value in amicus curiae, why require briefs at all? Why not allow petitions and letters to be entered into the appellate record? Most courts would reject that idea, sensing that such a policy would undermine respect for the court's legal reasoning function.²⁸⁸ Requiring a brief with legal argument performs some gatekeeping and emphasizes the importance of the law in the court's decisions. And yet, imposing no limit on the number and content of amicus curiae briefs can perhaps also undermine respect for the court's

283. See *id.* at 276 n.33.

284. See, e.g., *In re Custody of A.F.J.*, 314 P.3d 373 (Wash. 2013) (three organizations filed amicus briefs in a dispute involving the custody of a child parented by a same-sex couple).

285. It is easy to find examples of briefing invitations to amicus curiae by searching the case law databases for "amicus" in the same sentence as "invitation" or "invited". See, e.g., *Perez v. State*, 313 P.3d 862, 866, n.1 (Nev. 2013); *Baily v. Schaaf*, 812 N.W. 2d 770 (Mich. 2012); *State v. White*, 362 S.W. 3d 559, 565 (Tenn. 2012).

286. See Paul D. Carrington, *Justice on Appeal in Criminal Cases: A Twentieth-Century Perspective*, 93 MARQ. L. REV. 459,460 (2009) (arguing that federal courts of appeals are too enamored by their roles as law makers, and give error-correction short shrift, to the detriment of criminal justice).

287. See Simmons, *supra* note 2, at 196–97; Garcia, *supra* note 2, at 346.

288. See Krislov, *supra* note 4, at 710–11 (discussing judicial hostility to letters and telegrams received from the public in the 1940s and 1950s).

role or at least confuse the public about what courts actually do. If anyone can file a “me-too” brief, it gives the impression that anyone’s opinion should matter to the court.

Such an impression might be particularly troublesome with respect to elected judges in state courts. Most of the time, judicial races are sleepy affairs and often judges run unopposed.²⁸⁹ But in recent decades, contested elections have become more common.²⁹⁰ More money has become involved in judicial elections, with increased fundraising anxiety for judicial candidates.²⁹¹ State judges endeavor to balance their democratic obligations to the electorate with their judicial role as neutral arbiters of the law.²⁹² Increased political pressure in particular cases in the form of amicus briefs could upset that balance if there are no restraints whatsoever.

Of course, one might also argue that elected judges in particular should be sensitive to constituents’ views, and therefore greater amicus curiae participation should be allowed. And perhaps it is better to have the political pressure out in the open in the form of amicus briefs, rather than through back channels or television campaigns. Restricting amicus briefs—particularly Friend of a Party briefs—is a tricky matter in elected courts. But these courts would be warranted in putting some limits, especially on duplicative or “puppet of a party” briefs, in order to emphasize the difference between judicial decision-making and legislative negotiation.

289. See Rachel P. Caufield, *The Changing Tone of Judicial Election Campaigns as a Result of White*, in *RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS* 34 (Matthew J. Streb ed., 2007).

290. See *id.* at 36–37.

291. For an example of the importance of money in state judicial elections, see *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 873, 884, 886–87 (2009) (holding that the state court judge should have recused himself from the case when the CEO of a party gave \$3 million to his re-election campaign). Money, and out-of-state funding, are playing a growing role in state judicial elections. Erik Eckholm, *Outside Spending Enters Arena of Judicial Races*, *N.Y. TIMES*, May 5, 2014, at A12.

292. See Sorenson, *supra* note 8, at 1247–48 (discussing these pressures specifically in Texas); ABA *STANDING COMM. ON JUDICIAL INDEPENDENCE, PUBLIC FINANCING OF JUDICIAL CAMPAIGNS* 4, 9 (2002) (reaffirming that “the states have long struggled to reconcile their commitment to electoral accountability with the need to preserve judicial independence[,]” and recommending the financing of state judicial elections with public funds in order to reach the appropriate balance between a judge’s commitment to electoral accountability and their role as a neutral arbiter).

One can, therefore, make a principled argument that amicus curiae should be limited, particularly in the Friends of a Party and Independent Friends categories. A court of law is not the court of public opinion. The parties should retain the right to shape the litigation.

C. Reasonable Restrictions on Friend of a Party Amicus

Should courts wish to exercise their gatekeeping powers, there are some simple steps they could take. This section focuses on limits to Friend of a Party briefs, since these are the most numerous and likely to pose the greatest challenge. There are certainly arguments for restricting other types of amicus briefs. The Court's Lawyer type of amicus curiae, appointed to argue a position suggested by neither party, threatens to wrest the case from the litigants even more than a Friend of a Party could.²⁹³ The state, allowed to file a brief without consent or permission, now has many actors participating as amicus curiae—agencies, chief executives, legislators—who perhaps should not all be allowed to speak for the state.²⁹⁴ But the greatest growth in amicus curiae participation is in the Friend of a Party category.

In addition to requiring amicus curiae to disclose financial support and/or ghostwriting by a party, as many courts already do,²⁹⁵ courts concerned about amici curiae participation could return to the common law rationale for amicus curiae. A complete absence of screening threatens to lead to absurd results, such as experts who testify at trial and then attempt to file an amicus brief on appeal,²⁹⁶ or a trial judge appearing as amicus curiae to defend her reputation in the appellate court.²⁹⁷ To a large extent, a return to the common law justifications for amicus could effectively restrict amicus participation to those with a special interest or expertise. These criteria have been alluded to in the Supreme

293. See Goldman, *supra* note 19, at 914, 925, 942–45.

294. See *Voices for Choices v. Ill. Bell Tel. Co.*, 339 F.3d 542, 545–46 (7th Cir. 2003); Eisenberg, *supra* note 19, at 1266, 1274.

295. FED. R. APP. P. 29; see *supra* notes 223–24 (financial disclosure) and 232–36 (ghostwriting disclosure).

296. See *Witty v. Comm'n & Town of Harland*, 784 A.2d 1011, 1018 (Conn. App. Ct. 2001) (upholding trial court refusal to allow attorneys to testify as expert witnesses and also file an amicus brief).

297. See *Ligon v. City of New York*, 736 F.3d 166, 168–69 (2d Cir. 2013) (denying amicus status to lawyers for a district court judge whose case had been reassigned).

Court's *Northern Securities* decision,²⁹⁸ and in Judge Posner's decisions.²⁹⁹ Some state court decisions and court rules also articulate these common law criteria. For example, the Court of Appeals of Tennessee explained:

As a general matter, appointing an amicus is reserved for rare and unusual cases that involve questions of general or public interest. An amicus can assist the court by (1) providing adversarial presentations when neither side is represented, (2) providing an adversarial presentation when only one point of view is represented, (3) supplementing the efforts of counsel even when both sides are represented, and (4) drawing the court's attention to broader legal or policy implications that might otherwise escape the court's consideration.³⁰⁰

Similarly, the Mississippi Rules of Appellate Procedure require motions to file an amicus brief to state that

(1) amicus has an interest in some other case involving a similar question; or (2) counsel for a party is inadequate or the brief insufficient; or (3) there are matters of fact or law that may otherwise escape the court's attention; or (4) the amicus has substantial legitimate interests that will likely be affected by the outcome of the case and which interests will not be adequately protected by those already parties to the case.³⁰¹

These rules identify the Near Intervenor as a legitimate amicus curiae applicant and also permit amici curiae who truly have something helpful to contribute, especially where the party representation is inadequate or where amicus stands to be indirectly affected by the judgment. These rules do not insist on impartiality, nor do they suggest that a desire to weigh in is enough. Courts concerned about an overload of amicus curiae could return to these criteria as a way to evaluate amicus curiae petitions. They should not insist on impartiality or true friendship, concepts which have distracted courts from the real roles of amicus curiae.

Not all courts have the resources or visibility of the Supreme Court of the United States. Not all litigants in lower courts will enjoy the expert volunteer assistance that litigants before the Supreme Court can obtain to deal with a multitude of amicus briefs. Some litigants may be unduly burdened by the involvement of

298. See *N. Sec. Co. v. United States*, 191 U.S. 555, 555-56 (1903).

299. See, e.g., *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997).

300. *State ex rel. Comm'r of Transp. v. Med. Bird Black Bear White Eagle*, 63 S.W.3d 734, 758 (Tenn. App. 2001).

301. MISS. R. APP. P. 29(a); see also LA. SUP. CT. R. 7-12 (containing similar language).

amicus curiae in their case. If amicus curiae begin to file in federal or state appellate courts at the rate they now do in the Supreme Court, these courts should consider limiting amicus curiae out of consideration for litigants and the courts, as well as respect for the judicial process.

CONCLUSION

The Friend of the Court has risen in prominence, and yet has largely escaped scrutiny. The category of amicus curiae embraces quite different types of actors. Courts, and the court rules that govern amicus curiae participation, do not often distinguish between the Invited Friend, the Friend of the Party, or the Near Intervenor. All are “friends,” and yet the term covers a range of roles and types of input.

As the courts’ recurring references to the meaning of “friend of the court” demonstrate, the very term and its friendly implications have helped mask these distinctions. Courts are remarkably open to amicus curiae participation, despite the occasional expression of misgivings. The friendly connotations of the term, and the Supreme Court’s open-door policy, have established a norm of hospitality for amicus curiae, even as rules of joinder, intervention, party status, and standing have grown more constraining on others who wish to participate in appellate cases.

Although the state appellate courts do not seem to be all that restrictive of amicus curiae, they do wrestle with some of the contradictions of a category of friends that includes very interested Near Intervenors, Friends of a Party, the Court’s Lawyer, and advocacy groups not tied to a party.³⁰² If amicus curiae participation continues to grow, especially in certain states, these jurisdictions may want to take a closer look at the guest list. The open-door policy that works for the Supreme Court of the United States may not be advisable for courts with fewer resources and especially courts subject to direct democratic pressure.

Yet on the whole, judges—even those with the greatest number of amicus filings—do not seem overly concerned about amici curiae abuse of their positions. This indifference may result in part from the very flexibility of the amicus curiae category. Not only is

302. See *supra* Part III.B.3.

the term flexible enough to cover a range of friends, but the courts have great flexibility in dealing with the briefs.³⁰³ Judges are free to use, rely on, quote, discard, or ignore the presentations of amicus curiae. Because amici curiae have no right to have their arguments addressed, they can remain a pleasant-sounding, loosely defined category—as loosely defined as the term “friend” in everyday life.

But although judges may believe that they can sort through an increase in amicus curiae filings, their sense of control may be illusory. Studies have shown that amicus briefs are influential in court decisions.³⁰⁴ Courts should take a closer look at the different roles of amici curiae and consider whether it is time to put some restrictions on their friendship.

303. See *supra* Part III.

304. See, e.g., Kearney & Merrill, *supra* note 15, at 745–48 (providing an empirical study of the impact of amicus briefs on the Supreme Court of the United States); see also Sungaila, *supra* note 110, at 33–34 (citing various studies on the subject in both the Supreme Court and in state supreme courts).