

WHO participates as amici curiae in the U.S. COURTS OF APPEALS?

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In the past two decades, scholars have made remarkable advancements in the state of knowledge about the U.S. courts of appeals. We now have a better understanding of the political nature of their staffing¹ and the historical transformation that the lower federal court selection process underwent.² We also have a better grasp on the consequences of the organizational design of these courts³ and their position in the federal judicial hierarchy.⁴ Further, we have a deeper appreciation for the ways in which judges on these courts make law⁵ and how they influence the behavior of other actors.⁶ In sum, the characterization of the courts of appeals as "among the least comprehended of major federal institutions" is now much less apt a description of the state of knowledge regarding these courts than it was when Howard penned those words almost 30 years ago.⁷

This is certainly a welcome development given the opportunity the courts of appeals afford for advancing our understanding of the judiciary beyond what we know from the exclusive focus on the singular institution that is the U.S. Supreme Court. Further, it is a long overdue development in light of the importance of the courts of appeals as legal institutions in their own right. As Klein demonstrates, these courts make law in meaningful ways, particularly when the Supreme Court has not yet spoken.⁸ Moreover, for all practical purposes, the courts of appeals are the appellate courts of last resort in the federal judicial system given how few appeals are disposed of by the Supreme Court and how many appeals are disposed of by the courts of appeals.⁹

Though the state of knowledge regarding the courts of appeals has grown impressively, it has not grown uniformly; rather, "there continue to be important areas about which we remain stubbornly and conspicuously uninformed."¹⁰ This includes amici in the courts of appeals. Though we know a great deal about amici curiae in the Supreme Court—including the types of groups that file amicus briefs, why they participate, the nature of

their arguments, and if amicus participation matters for case outcomes¹¹—what we know regarding amici curiae in the courts of appeals is much more limited.¹²

This is unfortunate for several reasons. First, in terms of raw numbers, more amicus participation occurs in the courts of appeals than in the Supreme Court.¹³ Of course, in terms of the percentage of cases with amicus participation, amici are much more common in the Supreme Court. Nonetheless, the analy-

Given the consequential nature of amici curiae briefs in the courts of appeals, it behooves us to have an understanding of who is choosing to participate.

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1. Roger Hartley & Lisa Holmes, *Increasing Senate scrutiny of lower federal court nominees*, 80 JUDICATURE 274 (1997); Lisa Holmes & Elisha Sachak, *Judicial Appointment Politics in the 107th Congress*, 86 JUDICATURE 232 (2003); Sarah Binder & Forrest Maltzman, *The politics of confirming federal judges*, 92 JUDICATURE 320 (2009).

2. Sheldon Goldman, *PICKING FEDERAL COURT JUDGES* (New Haven: Yale University Press, 1997); Nancy Scherer, *The judicial confirmation process: Mobilizing elites, mobilizing masses*, 86 JUDICATURE 240 (2003); Nancy Scherer, *SCORING POINTS: POLITICIANS, ACTIVISTS, AND THE LOWER FEDERAL COURT APPOINTMENT PROCESS* (Palo Alto: Stanford University Press, 2005).

3. Jonathan Matthews Cohen, *INSIDE APPELLATE COURTS: THE IMPACT OF COURT ORGANIZATION ON JUDICIAL DECISION MAKING* (Ann Arbor: University of Michigan Press, 2002); Erin Kaleny et al., *Change over Tenure: Voting, Variance, and Decision Making on the U.S. Courts of Appeals*, 52 AM. J. POL. SCI. 490 (2008).

4. Donald Songer et al., *The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court-Circuit Court Interactions*, 38 AM. J. POL. SCI. 673 (1994); Sara Benesh, *The U.S. COURTS OF APPEALS AND THE LAW OF CONFESSIONS: PERSPECTIVES ON THE HIERARCHY OF JUSTICE* (New York: LFB Scholarly Publishing, 2002).

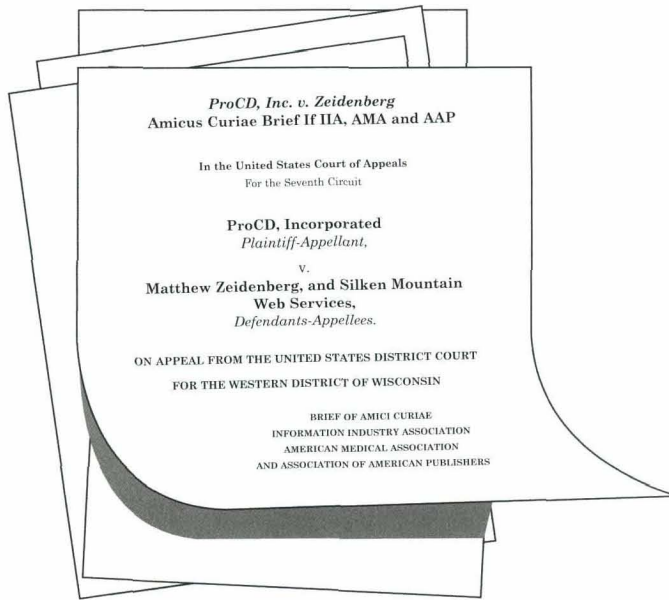
5. Susan Haire & Stefanie Lindquist, *Social security disability cases in the U.S. courts of appeals*, 80 JUDICATURE 230 (1997); Robert J. Hume, *Counting Multiple Audiences: The Strategic Selection of Legal Groundings by Judges on the U.S. Courts of Appeals*, 30 J. SUS. J. 14 (2009).

6. Robert J. Hume, *HOW COURTS IMPACT FEDERAL ADMINISTRATIVE BEHAVIOR* (New York: Routledge Press, 2009); Stefanie Lindquist & David Yalof, *Congressional responses to federal circuit court decisions*, 85 JUDICATURE 61 (2001).

7. J. Woodford Howard, *COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM: A STUDY OF THE SECOND, FIFTH, AND DISTRICT OF COLUMBIA CIRCUITS XVII* (Princeton: Princeton University Press, 1981).

sis of amici in the Supreme Court still represents an analysis of the minority of all amici participating in the federal system. Second, and more importantly, case history (which includes amicus participation in earlier stages) matters for understanding what transpires at the Supreme Court level. That is, understanding amicus activity at the court of appeals level is enormously informative for understanding amicus activity at the Supreme Court level.

Indeed, a nontrivial number of amici first enter into the legal fray at the court of appeals level. Provided a case is then appealed to the Supreme Court, these amici frequently continue their participation at the certiorari and/or merits stages.¹¹ Moreover, recent research indicates that amicus participation in the courts of appeals plays a substantial role in shaping the Supreme Court's agenda-setting decisions. For example, in their analysis of the Burger Court, Hagle and Spaeth report between one in four and one in five docketed cases with participation



8. David E. Klein, *MAKING LAW IN THE UNITED STATES COURTS OF APPEALS* (New York: Cambridge University Press, 2002).

9. Wendy Martinek, *Appellate Workhorses of the Federal Judiciary: The United States Courts of Appeals*, in Mark C. Miller, ed., *EXPLORING JUDICIAL POLITICS* (New York: Oxford University Press, 2008). Of course, given that most federal cases go no further than the U.S. district courts, the district courts are truly the courts of last resort in the federal system. In terms of federal appeals, however, that title goes to the courts of appeals.

10. Wendy Martinek, *Amici Curiae in the U.S. Courts of Appeals*, 34 AM. POL. RES. 803 at 804 (2006).

11. Clement Vose, *Litigation as a Form of Pressure Group Activity*, 319 ANNALS OF THE AM. ACAD. OF POL. AND SOC. SCI. 20 (1958); Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L. J. 694 (1963); Karen O'Connor & Lee Epstein, *Court Rules and Workload: A Case Study of Rules Governing Amicus Curiae Participation*, 8 J. SYS. J. (1983); Gregory Galdeira & John R. Wright, *Organized Interests and Agenda Setting in the U.S. Supreme Court*, 82 AM. J. POL. SCI. 1109 (1988); Greg Galdeira & John R. Wright, *Amici Curiae Before the Supreme Court: Who Participates, When, and How Much?* 52 J. OF POL. 783 (1990); Susan Behunak-Long, *Friendly fire: Amici curiae and Webster v. Reproductive Health Services*, 74 JUDICATURE 261 (1991); James Spriggs II & Paul Wahlbeck, *Amicus Curiae and the Role of Information at the Supreme Court*, 50 POL. RES. Q. 365 (1997); Lee Epstein & Jack Knight, *Mapping Out the Strategic Terrain: The Informal Role of Amici Curiae, in INSTITUTIONAL APPROACHES TO SUPREME COURT DECISION MAKING*, eds. Cornell Clayton and Howard Gillman (Chicago: University of Chicago Press, 1999); Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743 (2000); Ryan J. Owens & Lee Epstein, *Amici curiae during the*

Rehnquist years, 89 JUDICATURE 127 (2005); Paul Collins & Lisa Soloway, *INTEREST GROUP PARTICIPATION, COMPETITION, AND CONFLICT IN THE U.S. SUPREME COURT*, 32 LAW & SOC. INQUIRY 955 (2007); Paul Collins, *FRIENDS OF THE SUPREME COURT: INTEREST GROUPS AND JUDICIAL DECISION MAKING* (New York: Oxford University Press, 2008).

12. What little we know comes primarily from an early exploration of amicus participation in the U.S. courts of appeals as compared to the Supreme Court, Wayne McIntosh & Paul E. Parker, "Federal Friends of the Court: An Inter-Tier Comparison" (1986) (unpublished manuscript, on file with authors); a study of the dynamics driving amicus participation in the court of appeals, Martinek, *supra* n. 10; and a recent analysis of amicus curiae success in the courts of appeals, Paul Collins & Wendy Martinek, *Friends of the Circuits: Interest Group Influence on Decision Making in the U.S. Courts of Appeals*, 91 SOC. SCI. Q. 397 (2010).

13. McIntosh & Parker, *supra* n. 12; Martinek, *supra* n. 10.

14. For example, in *Pharmaceutical Research and Manufacturers of America v. Conncannon*, 249 F.3d 66 (1st Cir. 2001), four amicus briefs were filed at the court of appeals level. Three of these amicus briefs appeared in modified form once the case was accepted for review by the Supreme Court.

15. Tim Hagle & Harold Spaeth, *The Presence of Lower-Court Amici as an Aspect of Supreme Court Agenda Setting*, 30 JUST. SYS. J. 1 (2009). While Hagle and Spaeth provide evidence that the Supreme Court is more likely to accept cases for review that were accompanied by amicus briefs in the lower courts, it is not entirely evident if this is due to the ability of amici to signal the salience of a case or if amici are especially attracted to cases in the lower courts with wide ranging policy implications (i.e., those cases most likely to be accepted for review by the Supreme Court).

by amici in the lower court are accepted for review (as compared to the mere 1 in 20 petitions accepted overall).¹⁵ Thus, absent an understanding of amicus curiae in the courts of appeals, we are left with only a partial comprehension of this most important interest group litigation strategy. To be sure, understanding amicus curiae participation in the Supreme Court is important, but understanding such participation in that court should not end the inquiry.

Amicus activity

Amicus curiae participation in the federal courts of appeals is governed by the Federal Rules of Appellate Procedure. The requirements are much the same as those for participation in the Supreme Court. Permission from both of the direct parties to a suit is a prerequisite for filing an amicus brief, unless the potential amicus is the United States, a state, a territory, or the District of Columbia. As is the case in the Supreme Court, if one or the other or both of the direct parties to a case declines to grant permission, a potential amicus may seek the per-

mission of the court. The Federal Rules of Appellate Procedure further state that the "motion must be accompanied by the proposed brief"¹⁶ In other words, the would-be amicus filer must prepare and submit the brief *before* permission to file the brief has been granted.

The courts have generally been quite liberal in granting permission to file amicus briefs.¹⁷ Some legal scholars, however, have argued in favor of a much more restrictive approach because of their potential to overburden already overworked court of appeals judges or the threat they may pose to perceptions of fairness in the adversarial process.¹⁸ And, in fact, the generosity of the courts of appeals in granting leave to file is not entirely unbounded.

For example, the U.S. Court of Appeals for the Second Circuit has implemented the following rule: "The court will deny leave to file brief for an amicus curiae where, by reason of a relationship between a judge who would hear the proceeding and the amicus or counsel for the amicus, the filing of the brief would cause the recusal of the judge."¹⁹ The Ninth Circuit follows a similar practice with regard to the recusal of a member of an en banc court.²⁰

Some court of appeals judges, too, have taken a dim view of this practice. The sentiment expressed by Judge Richard Posner is an example of judicial disapproval:

The 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 is not one, in which the position of a nonparty has legal significance. And even in those cases the position can usually be conveyed by a letter or affidavit more concisely and authoritatively than by a brief.²¹

With some minor variations, formal requirements with regard to the timing, format, and content of amicus briefs are generally consistent both across the circuits and in comparison to the Supreme Court. For example, each amicus brief in a case

is limited to no more than half the maximum length of the briefs for the direct parties.²² But the number of such briefs is limited only by the ability of amici to meet the procedural requirements for filing. In terms of content, "the cover [of an amicus brief] must identify the party or parties supported and indicate whether the brief supports affirmation or reversal."²³ Notwithstanding this requirement, in some cases amici file briefs that do not explicitly support either litigant. As is clear, none of these requirements are exorbitantly burdensome in and of themselves, but securing the assistance of skilled legal talent to produce the kind of argumentation likely to be persuasive can be quite expensive. However, the available evidence suggests that filing an amicus brief is a much less expensive proposition than sponsoring a test case or filing suit as a direct party.²⁴

Where amici file

Though the rules and norms governing amicus curiae activity in the courts of appeals largely mimic those in the Supreme Court, amicus briefs are filed at a much lower rate in the courts of appeals, as noted earlier. For example, from 1990-1996, amicus briefs were filed in about 8 percent of court of appeals cases, compared to approximately 85 percent of cases in the Supreme Court.²⁵

The rather dramatic difference is likely due to the fact that the Supreme Court sits at the zenith of the American legal system and, as such, its decisions are effectively final. Given this, interest groups are particularly attracted to the Supreme Court as a venue for amicus participation since a victory there is much more permanent than a victory in the courts of appeals, which can be reversed by the Supreme Court. Moreover, groups may be more attracted to the Supreme Court because that Court's decisions are binding on the nation as a whole, while court of appeals decisions are only binding within the circuit in which they are rendered. Thus, groups seeking to ensure far-reach-

ing policy gains have a substantial incentive to file amicus briefs in the Supreme Court, as opposed to the courts of appeals, particularly if they are concerned about husbanding limited resources.

Nonetheless, there are a number of similarities between the types of cases that attract amicus briefs in the courts of appeals and the Supreme Court. For example, with regard to the issue area in which the litigation is involved, amici are especially attracted to cases involving civil rights and liberties and disputes involving economic activity, regardless of venue.²⁶ Moreover, interest groups are particularly attentive to cases in both institutions that offer the best opportunities to influence the development of legal and social policy.

For example, amicus briefs are more prevalent, in both the Supreme Court and the courts of appeals, in particularly salient litigation and cases involving judicial review.²⁷ This suggests that interest groups view the courts of appeals as significant policymaking venues and, as such, they target these venues in an attempt to have their preferred policy preferences engraved into law. Recent research indicates that amici curiae are capable of both shaping decision making in the

16. Fed. R. App. P. 29(b).

17. Michael E. Tigar & Jane B. Tigar, *FEDERAL APPEALS: JURISDICTION AND PRACTICE*, 3rd edition (Eagan: West, 1999).

18. John Harrington, *Amici Curiae in the Federal Courts of Appeals: How Friendly Are They?*, 55 CASE W. L. REV. 667 (2005).

19. 2ND CIR. R. 29.1.

20. 9TH CIR. R. 29.2; CIRCUIT ADVISORY COMMITTEE NOTE.

21. *Voices for Choices v. Illinois Bell Telephone Company*, 339 F.3d 542 at 545 (7th Cir. 2003).

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

23. FED. R. APP. P. 29(c).

24. Gary E. Smith & Beth E. Terrell, *The Amicus Curiae: A Powerful Friend for Poverty Law Advocates*, 29 CLEARINGHOUSE REV. 772 (1995); Anita M. Moorman & Lisa Pike Masteralexis, *Writing an Amicus Curiae Brief to the United States Supreme Court*, PGA TOUR, INC. v. MARTIN: *The Role of the Disability Sport Community in Interpreting the Americans with Disabilities Act*, 11 J. OF LEG. ASPECTS OF SPORT 285 (2001).

25. Kearney & Merrill, *supra* n. 11; Martinek, *supra* n. 10.

26. Collins, *supra* n. 11; Collins & Martinek, *supra* n. 12.

27. Lisa Solowij & Paul Collins, *Counteractive Lobbying in the U.S. Supreme Court*, 37 AM. POL. RES. 670 (2009); Martinek, *supra* n. 10.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

KATE SCHWEIZER, on behalf of herself
and all others similarly situated,
Plaintiff-Appellant,

v.

TRANS UNION CORPORATION,
Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF FOR AMICUS CURIAE
FEDERAL TRADE COMMISSION

courts of appeals²⁸ and increasing the likelihood of Supreme Court review.²⁹

It is apparent that amici participating in the courts of appeals pursue two primary operative goals. First, they seek to persuade court of appeals panels to endorse the position forwarded in the amicus briefs. Second, they attempt to shape the case for the purpose of enhancing the prospects of Supreme Court review,³⁰ and presumably victory at that level. The question to which we turn now is what is the nature of the groups pursuing these objectives?

Who are the amici?

To examine the participation of amicus curiae in the courts of appeals, we begin with data extracted from the Kuersten and Haire database,³¹

Table 1. Classification of amicus curiae in the U.S. courts of appeals based on group membership

Amicus type	Examples
Individuals	Academics Adoptive parents Pfizer United Parcel Service
Corporations	Equal Opportunity Commission Securities and Exchange Commission State of Alabama State of New York Bakersfield, California Metropolitan Denver Water Authority American Civil Liberties Union Citizens Committee for the Right to Keep and Bear Arms
United States	
State governments	
Local governments	
Public advocacy organizations	Pacific Legal Foundation Student Press Law Center American Bankers Association Society of Professional Journalists International Brotherhood of Electrical Workers Local Number 969 United Mine Workers of America American Federation of Labor-Congress of Industrial Organizations New York State School Boards Association Democratic National Committee Rosebud Sioux Tribe
Public interest law firms	
Trade associations	
Unions	
Peak associations	
Other organizations	

which contains a random sample of 30 courts of appeals cases from each circuit, with the exception of the Federal Circuit, from 1997 to 2002.³² The database also contains a variable indicating whether any amicus briefs were filed in each case. Based on this information, we collected

original data on how many amicus briefs were filed in each case and the names of the entities that participated as amici curiae. We obtained information on the number of amicus briefs filed from Westlaw and PACER, the Public Access to Court Electronic Records dataset maintained by the Administrative Office of the United States Courts. Our final dataset contains 2,160 cases in which, collectively, 305 amicus briefs were filed by 730 amici in 175 cases (8.1 percent).

We compiled information regarding the types of amici that participate in the courts of appeals from the websites of the organizations who filed the briefs, supplemented by information contained in the amicus briefs themselves. We give no special weight to the amici listed first on an amicus brief since coalitional amici may list each amicus alphabetically or randomly. In other words, all amici are

28. Collins & Martinek, *supra* n. 12.

29. Hagler & Spaeth, *supra* n. 15.

30. An additional objective for interest group amici may be to attract new members and retain existing members but, to date, there is no evidence on this point with regard to the courts of appeals. With regard to the Supreme Court, however, see Thomas G. Hansford, *Information Provision, Organizational Constraints, and the Decision to Submit an Amicus Curiae Brief in a U.S. Supreme Court Case*, 57 POL. RES. Q. 219 (2004); Thomas G. Hansford, *Lobbying Strategies, Venue Selection, and Organized Interest Involvement at the U.S. Supreme Court*, 32 AM. POL. RES. 170 (2004); and Donald Songer & Reginald Sheehan, *Interest Group Success in the Courts: Amicus Participation in the Supreme Court*, 46 POL. RES. Q. 339 (1995).

31. Formally, this database is an extension of the United States Courts of Appeals Data Base originally created by Donald R. Songer. Both are archived at <http://www.cas.sc.edu/pol/juri/juri/>. See Reginald Sheehan & Tracey George, *Circuit breaker: Deciphering courts of appeals decisions*

using the U.S. courts of appeals data base, 83 JUDICATURE 240 (2000).

32. The U.S. Court of Appeals for the Federal Circuit's specialized jurisdiction—which is a nationwide jurisdiction including appeals from the U.S. Court of Federal Claims, the U.S. Court of International Trade, and the U.S. Court of Appeals for Veterans Claims—makes it quite different from the other courts of appeals. This lack of comparability makes it inappropriate for inclusion in the analyses presented here.

33. This is not to imply that coalitional behavior among amici is not important. Indeed, Hansford's analysis of coalitional behavior by amici in the Supreme Court suggests that the choice to file alone or join a coalition brief is structured in important ways by the amount of experience an amicus has in lobbying the court. Thomas G. Hansford, "Explaining the Decision to File an Amicus Curiae Brief Alone or with a Coalition of Interests" (2004) (unpublished manuscript, on file with authors). But coalition behavior is beyond the scope of the present endeavor.

treated equally in our analyses.³³ We relied on the organizations' websites in those instances in which we were unable to extract sufficient information regarding the identity of the amici from the briefs themselves. Because PACER only contains the identity of each amicus, and because Westlaw does not contain all of the amicus briefs filed in the courts of appeals, the bulk of our data were obtained from groups' websites.

Categories of amici

We employ two classification schemes to obtain leverage over the diversity of amici in the courts of appeals. First, following the primary method employed in the extant research, we categorized amici in accordance with their basic unit of membership.³⁴ For example, we distinguish amicus briefs filed by individuals from those filed by institutional interests, such as corporations and governments. We also separate membership associations, which are comprised of individuals (e.g., public advocacy organizations), from peak associations, whose memberships are made up of institutions. This classification scheme has the advantage of permitting comparison with existing findings about group participation in the Supreme Court.

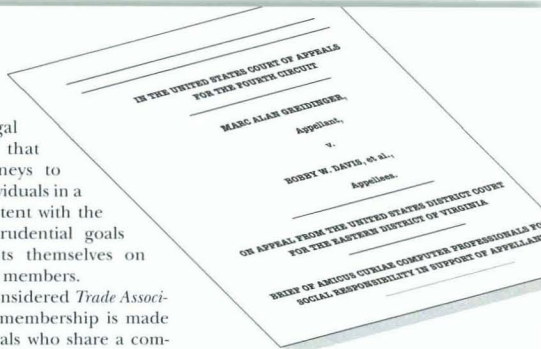
There are 11 categories of amici based on this group typology. Table 1 lists them and provides examples of each. Individuals who are not connected to a particular organization are classified simply as *Individuals*. *Corporations* are amici identified by their corporate monikers. Federal commissions, agencies, and other federal-level entities comprise the *United States* category while the category of *State Governments* is comprised of state governments, including state-level agencies. Cities, counties, and other municipal governments (including any sub-state-level agencies) are categorized as *Local Governments*. *Public Advocacy Organizations* are those groups whose membership consists of individuals (regardless of their occupational status) and who seek primarily political benefits for their members. Groups are classified as *Public Interest*

Law Firms if they are non-profit legal organizations that provide attorneys to represent individuals in a manner consistent with the group's jurisprudential goals or file lawsuits themselves on behalf of their members.

Amici are considered *Trade Associations* if their membership is made up of individuals who share a common occupation, while those that identify themselves as labor organizations representing individuals employed in a particular occupation are considered *Unions*. *Peak Associations* consist of amici whose basic unit of membership is the organization. That is, peak associations do not have members in the ordinary sense, but rather are organizations whose members are other organizations and institutions. Finally, organizations that do not fit into the categories described above are classified as *Other Organizations*; e.g., the Rosebud Sioux Tribe.

Our second classification of amici focuses on the issue area in which each amicus is primarily involved. Here, we are concerned not with each amicus's basic unit of membership, but rather with the content of the policies to which each amicus devotes its attention. We base our interest area typology coding on a modification of the Baumgartner and Jones policy agendas project.³⁵ Those scholars created a classification scheme that allows for the temporal comparison of issues at the forefront of American politics. The advantage of this scheme is that it permits a finely grained analysis of the diversity of groups' substantive interests.

There are 10 categories of amici based on this typology. Table 2 lists these and provides examples of each. The category of *Banking, Commerce, and Macroeconomics* includes those amici who involve themselves primarily in economic matters. This category also includes corporations who did not fit into one of the other cate-



gories described below.³⁶ The category of *Civil Rights, Law, Crime, and Family* is composed of amici who focus primarily on issues of legal policy, including the rights of the disadvantaged in society, while the *Education* category includes amici whose primary issue focus involves educational issues.

Amici who are involved in energy, the environment, public lands, and water management are classified as *Energy and Environment* amici; those primarily involved in medical and public health issues are classified as *Health* amici; and those involved in labor and employment issues are classified as *Labor and Employment* amici. *Space, Science, and Technology* consists of amici who are involved in those specified technological fields while *Governmental Entities* is composed of governmental units. Finally, amici that do not fit into any of the categories described above are categorized as *Other Issue Areas*; e.g., Joint Sports Claimants and the United States Golf Association.

The distribution of amici participating in the courts of appeals based on their group membership appears in Table 3, while Table 4 presents an overview of amicus participation based on the classification of groups according to their substantive interests. The first column of figures in each of these tables (number of

34. Caldeira & Wright, *supra* n. 11.

35. Frank R. Baumgartner & Bryan D. Jones, *Policy Agendas Project*, available at <http://www.policyagendas.org/index.html>.

36. This includes, for example, Bruce W. Eberle and Associates, C.E. Thurston and Sons, and Dow Jones and Company.

Table 2. Classification of amicus curiae in the U.S. courts of appeals based on group issue area

Amicus type	Examples
Banking, commerce, and macroeconomics	American Iron and Steel Institute National Association of Independent Insurers NOW Legal Defense and Education Fund Wyoming Coalition Against Domestic Violence and Sexual Assault Council for Christian Colleges
Civil rights, law, crime, and family	Massachusetts Association of School Superintendents American Petroleum Institute Corporate Environmental Enforcement Council American Foundation for Aids Research Teva Pharmaceuticals
Education	Council on Labor Law Equality National Federation of Federal Employees Association for Competitive Technology Union Carbide
Energy and environment	Association of American Railroads American Automobile Manufacturers Association City of Houston United States of America Joint Sports Claimants United States Golf Association
Health	
Labor and employment	
Space, science, and technology	
Transportation	
Governmental entities	
Other	

Table 3. Amicus curiae participation in the U.S. courts of appeals by group membership, 1997-2002

(in cases with at least one amicus curiae brief)

Amicus type	Number of cases	Number of briefs	Number of amici
<i>Individuals</i>	21 (12.0%)	24 (7.9%)	105 (14.4%)
<i>Corporations</i>	17 (9.7%)	18 (5.9%)	53 (7.3%)
<i>United States</i>	39 (22.3%)	41 (13.4%)	41 (5.6%)
<i>State governments</i>	16 (9.1%)	18 (5.9%)	57 (7.8%)
<i>Local governments</i>	6 (3.4%)	7 (2.3%)	42 (5.8%)
<i>Public advocacy organizations</i>	45 (25.7%)	71 (23.3%)	115 (15.8%)
<i>Public interest law firms</i>	38 (21.7%)	48 (15.7%)	72 (9.9%)
<i>Trade associations</i>	46 (26.3%)	63 (20.7%)	95 (13.0%)
<i>Unions</i>	8 (4.6%)	8 (2.6%)	18 (2.5%)
<i>Peak associations</i>	52 (29.7%)	64 (21.0%)	126 (17.3%)
<i>Other organizations</i>	5 (2.9%)	5 (1.6%)	6 (0.8%)
Total	175	305	730

These data represent amicus curiae participation in a random sample of 2,160 U.S. courts of appeals cases from 1997-2002. Three hundred five amicus curiae briefs were filed by 730 amici in 175 cases in the sample (8.1%). Numbers in parentheses indicate within column percentages. These percentages were calculated by dividing the total number of times each type of amicus appeared on a brief by the total number of cases with amicus participation (column one), the total number of amicus briefs filed (column two), or the total number of amicus participating (column three). Because different types of amici frequently cosign the same amicus curiae brief, the totals reported in the first and second columns of figures do not sum to 100%.

cases) indicates, for those cases with amicus participation, the *number of cases* in which each category of amici appeared on at least one amicus brief. The second column (number of briefs) provides information relating to the *number of amicus briefs* on which each category of amicus was present. The third column (number of amici)

presents the *number of amici* constituted by each category of amicus. The entries in these tables are the number of cases, briefs, and amici, respectively, while the entries in parentheses indicate within column percentages.

Diversity of amici

Beginning with Table 3, it is evident

that a wide array of interest groups (as categorized by type of membership) files amicus briefs in the courts of appeals. The most frequent amicus participants are *peak associations*, *trade associations*, *public advocacy organizations*, the *federal government*, and *public interest law firms*. Each of these categories par-

Table 4. Amicus curiae participation in the U.S. courts of appeals by group issue area, 1997-2002

(in cases with at least one amicus curiae brief)

Amicus type	Number of cases	Number of briefs	Number of amici
Banking, commerce & macroeconomics	32 (18.3%)	41 (13.4%)	81 (11.1%)
Civil rights, law, crime & family	76 (43.4%)	125 (41.0%)	323 (44.3%)
Education	11 (6.3%)	16 (5.2%)	21 (2.9%)
Energy & environment	15 (8.6%)	20 (6.6%)	38 (5.2%)
Health	17 (9.7%)	20 (6.6%)	30 (4.1%)
Labor & employment	12 (6.9%)	12 (3.9%)	18 (2.5%)
Space, science & technology	14 (8.0%)	17 (5.6%)	30 (4.1%)
Transportation	9 (5.1%)	10 (3.3%)	18 (2.5%)
Government entities	59 (33.7%)	66 (21.6%)	141 (19.3%)
Other issue area	14 (8.0%)	14 (4.6%)	30 (4.1%)
Total	175	305	730

These data represent amicus curiae participation in a random sample of 2,160 U.S. courts of appeals cases from 1997-2002. Three hundred five amicus curiae briefs were filed by 730 amici in 175 cases in the sample (8.1%). Numbers in parentheses indicate within column percentages. These percentages were calculated by dividing the total number of times each type of amicus appeared on a brief by the total number of cases with amicus participation (column one), the total number of briefs filed (column two), or the total number of amici participating (column three). Because different types of amici frequently cosign the same amicus curiae brief, the totals reported in the first and second columns of figures do not sum to 100%.

ticipated in 20-30 percent of cases in which at least one amicus brief was filed. The least frequent amici in terms of the number of cases were unions, local governments, and other organizations. The second column of figures reports the number of briefs on which at least one of the categories appeared. Of the 305 amicus briefs filed, at least one public advocacy organization appeared on 23.3 percent of the briefs, at least one peak or trade association appeared on 21 percent of the briefs, and at least one public interest law firm was present on almost 16 percent of the briefs. Again, the least frequent participants were unions, local governments, and other organizations.

The third column reveals how often each amicus type is represented compared to all other categories of amici. Peak associations comprised 17.3 percent of all amici, followed by public advocacy organizations (15.8 percent), individuals (14.4 percent), trade associations (13 percent), and public interest law firms (9.9 percent). These figures suggest that these amicus types are especially likely to engage in coalitional activity by joining each other's amicus briefs.

Table 4 presents information relating to the distribution of groups based on their substantive interests. Regardless of whether one examines the number of cases in which each category of amici appears (the first column of figures), the number of

briefs (the second column of figures), or the number of amici (the third column of figures), a clear picture emerges: bar none, the most frequent amici in the courts of appeals are those concerned with civil rights, law, crime, and family. Indeed, these

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
NO. 96-2887

Oasis Publishing Co.,
Plaintiff-Appellant

- vs -

West Publishing co.,
Defendant-Appellee

BRIEF AMICUS CURIAE
OF MATTHEW BENDER & CO., INC.
CONCERNING THIS COURTS LACK
OF SUBJECT MATTER JURISDICTION,
AND, IN THE ALTERNATIVE,
IN SUPPORT OF APPELLANT OASIS PUBLISHING CO.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA, THIRD DIVISION

Table 5. Comparison of amicus curiae participation in the courts of appeals and Supreme Court

(based on type of group membership and in cases with at least one amicus curiae brief)

Amicus type	Courts of appeals (1997-2002) ¹	Supreme Court (1995) ²
Individuals	14.4%	22.3%
Corporations	7.3%	6.9%
United States	5.6%	1.7%
State governments	7.8%	20.7%
Local governments	5.8%	3.3%
Public advocacy organizations	15.8%	12.4%
Public interest law firms	9.9%	4.2%
Trade associations	13.0%	17.4%
Unions	2.5%	1.8%
Peak associations	17.3%	5.0%
Other organizations	0.8%	4.2%

1. Source: Authors.

2. Source: Collins & Solowiej, *Interest Group Participation, Competition, and Conflict in the U.S. Supreme Court*, 32 Law & Soc. Inquiry 955 (2007).

groups appeared in 43.4 percent of cases and on 41 percent of briefs, making up 44.3 percent of all amici. These groups are followed by governmental entities, which make up 19.3 percent of all amici, and banking, commerce, and macroeconomic organizations, which represent 11.1 percent of all amici. Following these three group types, the other organizational issue areas are represented in more or less equal terms, with each category of amicus constituting less than 10 percent of the overall amici.

That civil rights, law, crime, and family organizations are well represented does not come as a surprise in light of Collins and Martinek's finding that most amicus briefs are filed in civil rights and liberties cases.³⁷

Moreover, the fact that banking, commerce, and macroeconomics groups are frequent amici is consistent with those authors' evidence that economic activity and regulation cases involve the second highest percentage of amicus participation.

Collins and Solowiej employed the same classification scheme outlined in Table 1 and utilized in Table 3 to classify interest group amicus participation in the 1995 Supreme Court term.³⁸ Table 5 compares our findings regarding the courts of appeals to the evidence they provide regarding the Supreme Court. A similar picture emerges. For example, in both courts, business interests (i.e., corporations and trade associations) account for between one and four

and one in five amici. Further, another approximately one in four to one in five amici are public interest groups (i.e., public advocacy organizations and public interest law firms). Moreover, it is evident that an assortment of other interest groups, use the courts of appeals to pursue their policy goals, including governments, peak associations, and ad hoc associations of individuals in both courts. This stands in stark contrast to Washington lobbying more generally. For example, Schlozman examined organizational representation in the nation's capital, evincing that 70 percent of organizations were tied to business interests.³⁹

Of course, the fact that we provide evidence of diversity of interest group participation does not necessarily infer that each amici is equally capable of influencing decision making on the courts of appeals. In this sense, while this research can speak to the participation of interest groups before these courts, it cannot address the impact of amici and whether certain types of groups are more influential than others.⁴⁰

Although we are the first to employ the particular interest group issue area classification scheme outlined in Table 2 and utilized in Table 4 in the study of interest groups in the federal courts, Epstein used a similar categorization of amici in her study of organizational activity in a sample of 16 state courts of last resort from a sample of years.⁴¹ She found that, in 1990, business interests constituted 23 percent of amici, while civil rights, law, crime, and family organizations⁴² comprised 37 percent of amici. Informed by these findings, Epstein concluded that a wide range of organizations plays a role in state supreme court jurisprudence.

Comparing those findings with ours, we find that business interests (i.e., banking, commerce, and macroeconomics) make up 11 percent of all amici in the courts of appeals, while civil rights, law, crime, and family organizations represent 44 percent. Government interests participate in roughly the same numbers in the

37. Collins & Martinek, *supra* n. 12.

38. Collins & Solowiej, *supra* n. 11.

39. Kay Lehman Schlozman, *What Affects the Heavenly Chorus? Political Equality and the American Pressure System*, 46 J. of Pol., 1006 (1984).

40. While understanding the influence of amicus briefs on the courts of appeals is important, in the context of the present analysis it would be somewhat misleading to simply report the winning percentages for each category of amici since the same category of amicus frequently square off on opposing sides of the debate. For example, it is common for states to line up on different sides of a case and the same occurs for other categories of amici, such as corporations, public advocacy organizations, and

public interest law firms (e.g., the Pacific Legal Foundation and the NAACP LDF). In such instances, one amici falling under the same typology necessarily wins, while the other necessarily loses. Accordingly, it is not entirely evident what type of influence might be inferred from this.

41. Lee Epstein, *Exploring the Participation of Organized Interests in State Court Litigation*, 47 Pol. Res. Q. 335 (1994).

42. Epstein did not use the exact same coding scheme applied here. To allow a comparison to our civil rights, law, crime, and family category, we combine Epstein's classification of civil liberties, legal, and religion as these interest categories fall within our civil rights, law, crime, and family typology.

courts of appeals (19 percent) and state courts of last resort (23 percent), as do education, health, and labor organizations. In other words, we find even greater diversity of participation in the courts of appeals than Epstein did in the state courts of last resort.

Conclusion

Our motivation has been a simple one: we wanted to know who participates as amicus curiae in the courts of appeals. Though interest groups have more tools at their disposal than the amicus curiae brief, it is a particularly important tool—arguably the most important tool—when groups choose to participate in the judicial arena. These briefs influence success in the courts of appeals and contribute meaningfully to the Supreme Court's certiorari decisions. Given the consequential nature of amicus curiae briefs in the courts of appeals, it behooves us to have an understanding of who is choosing to participate. Knowing whether court of appeals amici are of a particular kind (e.g., businesses, individuals) or have particular substantive interests (e.g., banking, civil rights) provides valuable information as to the nature of

interest group participation in these courts. This is perhaps particularly poignant information to have given the sometime view of the courts as providing a level playing field for all, a view fostered by high profile cases in which the courts seemed to be active agents seeking to advance the rights of those unable to secure relief in the "political" branches of government.⁴³

Certainly, disproportionate influence on policy outcomes does not require active participation by the select few. As Winters and Page observe in their discussion of oligarchic influence in American politics, electoral activities, opinion shaping, and constitutional rules are also significant means for oligarchic interests to exert (disproportionate) influence on political outcomes.⁴⁴

The case of constitutional rules is especially interesting vis-à-vis the competition among interests that plays out in the judiciary considering the role of the federal courts (including the courts of appeals) in interpreting and

enforcing constitutional law. That process of interpretation inevitably produces winners and losers not only in the short-term in the instant case but also in the long-term in the legal rules embedded in court rulings, legal rules that can favor some classes of litigants over others for quite some time into the future. Regardless, lobbying in the form of filing of amicus curiae briefs in the courts is one very potent mechanism used to pursue influence on policy. The findings reported here indicate that, whether amici are categorized on the basis of their membership or on the basis of their substantive area of interest, the constellation of amici participating in the courts of appeals is marked by diversity and competition. ☐

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43. See, e.g., Vose, *supra* n. 11.

44. Jeffrey P. Winters & Benjamin I. Page, *Oligarchy in the United States*, 7 PERSPECTIVES ON POL. 731 (2009).

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