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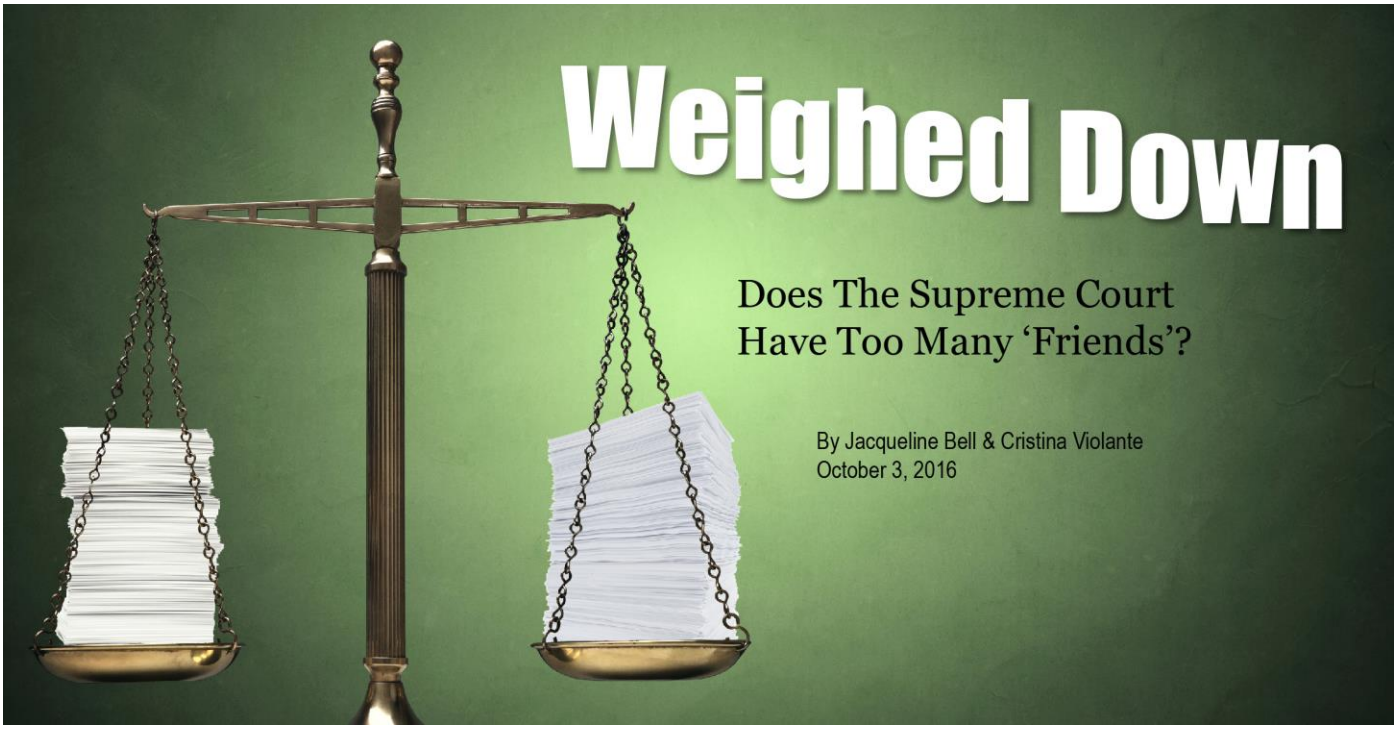


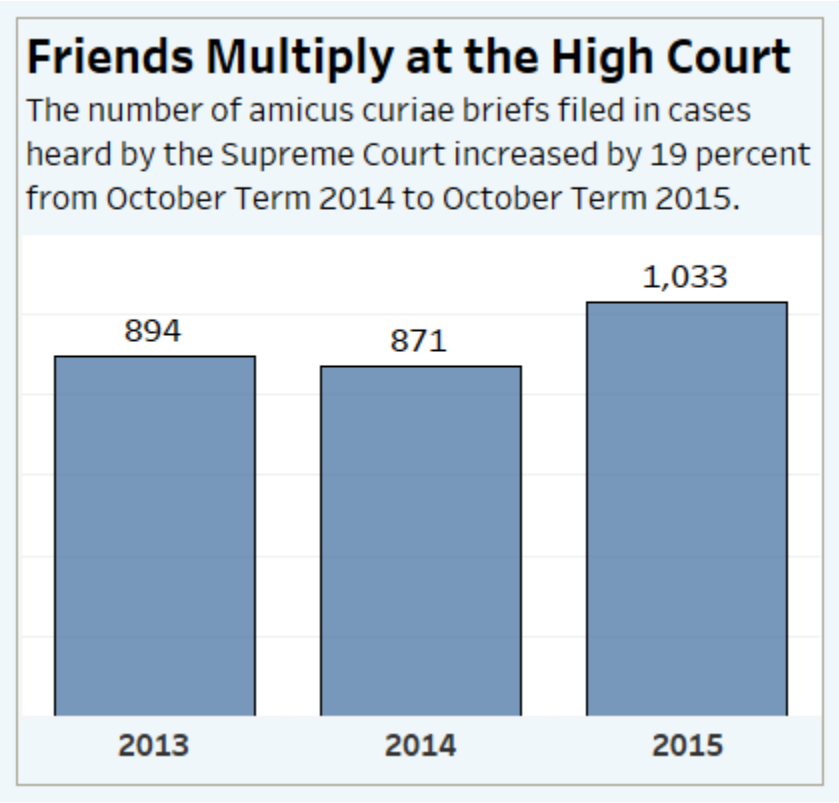
At Supreme Court oral arguments one early October morning in 2014, the justices were engaged in a lively discussion, much of it among themselves, on the particularly thorny problem of whether they had the authority to rule on the class action dispute before them given that the lower court hadn't actually ruled on the merits of the case. Could they decide it, or was it out of their hands?

After the court spent the bulk of the full hour on that single topic, Justice Ruth Bader Ginsburg said something unusual to one of the attorneys before the bench.

"Do I remember it wrong in — in thinking that in your briefing you didn't raise this question? … There was one green brief, Public Citizen, that brought up this question."

In other words, the question that had consumed nearly the entire oral argument in Dart Cherokee Basin Operating Company LLC v. Owens that day had not been part of the litigants' original pleas at all. It had been brought up in an amicus curiae, or "friend-of-the-court," brief, bound with the traditional green cover.

It is the rare oral argument where an amicus is name-checked by the court; rarer still is the oral argument completely dominated by a question raised in just one amicus brief.



"I don't remember ever seeing anything like that," said Public Citizen litigation group attorney Scott Nelson, a former Supreme Court law clerk who wrote the group's amicus brief. "That obviously is kind of what you dream about when you write an amicus brief."

For the vast majority of the hundreds upon hundreds of amicus briefs filed with the court, that hope will never be realized. An amicus brief is an opportunity for anyone potentially affected by a Supreme Court case, or anyone with special expertise, to advise the justices and provide a fresh perspective beyond the interests of the parties. Yet few filers get even the slightest hint that their amicus brief had any effect on the court's thinking.

Of the almost 3,000 amicus briefs filed in decided cases over the past three terms, only 8 percent have been cited in court opinions. A few filers may detect a distant echo of their brief in the majority's opinion or catch an inkling of their argument in a justice's dissent. But most amici are left with little indication from the court that the brief they labored over was noticed by anyone at all.

Still, the amicus briefs keep piling up. In the last term 1,033 amicus briefs were filed at the Supreme Court, particularly in high-profile cases covering abortion, immigration and affirmative action — a nearly 20 percent increase over the number filed in the previous term — according to a Law360 analysis of certiorari and merits stage amicus briefs filed in decided cases.

Amid the avalanche of amicus briefs last term, the justices cited a lower percentage of them in their opinions than they had the previous two terms, specifically naming just 7.5 percent of those filed, down from nearly 10 percent in the October 2013 term.

The number of amicus briefs filed with the Supreme Court has been steadily rising for decades. In the 1950s at least one amicus brief was filed in 23 percent of argued cases. By the mid-1990s, that figure had ballooned to 85 percent, according to a 2000 study by law professors Joseph Kearney and Thomas Merrill. Now it's the rare case that has no amicus briefs at all.

The size of the amicus brief stack for many cases at the Supreme Court has also changed dramatically. The most high-profile, divisive matters have long attracted large numbers of amicus briefs, particularly abortion and affirmative action cases. But between 1946 and 1995, only six cases drew more than 30 briefs, according to the law professors' study. In the past term alone there were nine cases that did, and three that collected more than 80.

There are signs that the increasing onslaught of amicus briefs weighs heavily on the court. The Supreme Court's own Rule 37, which covers the filing of amicus briefs, suggests that at least some portion of the amicus briefs filed create more clutter than clarity.

"An amicus curiae brief that brings to the attention of the court relevant matter not already brought to its attention by the parties may be of considerable help to the court," the rule states. "An amicus curiae brief that does not serve this purpose burdens the court, and its filing is not favored."

Even if an amicus brief is relevant and compelling, there's always the chance that it won't have the effect the filers intend. The brief that consumed so much of the justices' attention that October morning two years ago ultimately failed to persuade a majority of them to rule for the party Public Citizen was supporting. In other words, even if you're lucky enough to catch the court's eye, there's still a good chance you will lose.

With so much competition for the justices' attention, and so little encouragement, why are so many so intent on becoming the high court's friend?

Say That Again?

No matter how you pronounce the word "amicus," you can be secure in the knowledge that at least two Supreme Court justices favor a different pronunciation.

Chief Justice John Roberts goes with the popular uh-MEE-kuss pronunciation, emphasizing the "me" in "amicus." He is joined in that pronunciation by several of his fellow justices including Justices Anthony Kennedy, Samuel Alito, Ruth Bader Ginsburg and Sonia Sotomayor. The late Justice Antonin Scalia preferred this pronunciation as well.

Justice Elena Kagan uses an alternate pronunciation but one still frequently heard in legal circles: AM-uh-kuss. Beginning with a short "A," it's a pronunciation built for speed, with the speaker hitting the first syllable hard and then sliding quickly through the rest of the word.

Justice Stephen Breyer, as in so many other areas, walks his own road, consistently choosing the off-beat, uncommon pronunciation ah-MYE-kuss, lingering over the "eye" of the second syllable. There's some evidence that this pronunciation, however, can be contagious. We found at least one moment at an oral argument recently where Justice Sotomayor momentarily adopted his version, before quickly returning to her more typical uh-MEE-kuss pronunciation.

According to Brian Krostenko, professor of classics at the University of Notre Dame, the chief justice's pronunciation is the closest to what you'd hear in the world of American Latin scholars — but the final syllable would have a warmer, more lyrical "coo" sound: "ah-MEE-coos".

“That’s how a Roman would have said it, as far as we can guess,” Krostenko said.

As for Justice Breyer’s pronunciation, Krostenko reports that it is actually a typical English take on the Latin word. Justice Kagan’s version is an Americanization — drawing it closer to the word “amicable.”

The Science of Persuasion

For experienced Supreme Court advocates, marshaling a well-rounded cohort of amici in support of your position is a now common element of their litigation strategy — part of a broader effort to ensure that the justices get the best view of the case and the merits of a particular argument.

Carter Phillips

“One of your first thoughts is: Where can I get friends? There’s more of a push from the actual parties to encourage entities to show up and support them — at the cert stage to demonstrate that it’s an important issue, at the merits stage that it’s an issue where there seems to be a consensus of some part of the U.S. and the world that supports the position being advocated,” said Carter Phillips, a partner at Sidley Austin LLP who has argued before the Supreme Court more than 80 times.

The work of encouraging and coordinating amicus briefs has become a practice unto itself. Elite Supreme Court advocates, particularly in high-profile cases, work to determine not only which groups are likely to weigh in but what argument they’re likely to make. A sophisticated strategy will also target particular interest groups, in hopes of wooing those most likely to be influential with the court.

“It’s about getting the numbers and getting the filing of the briefs, but it’s also about the content of briefs and coordinating what the briefs will say to get the information that the advocates think is useful to the court for the justices to rule their way,” said Neal Devins, a law professor at William & Mary who has studied the process.

That activity can be particularly important when a party is trying to convince the justices to review a case. Garnering support in the form of numerous friends of the court briefs can have a significant impact and provide a strong signal to the justices that a petition is worth a second look.

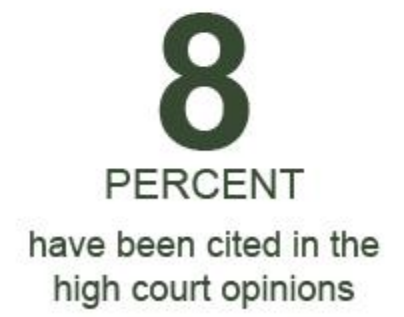
“At the certiorari stage level, there’s been a sea change in the number of amici briefs that are filed compared to 25 or 30 years ago,” said Lawrence Ebner, founder of Capital Appellate Advocacy.

“It’s unusual for cert to be granted in a case unless there is at least one amicus brief, and often two or three or four, supporting the cert petition.”

A Growing Pressure To File

For some trade groups and advocacy organizations, filing amicus briefs with the Supreme Court has become a significant part of their mission. The number of organized interest groups in the U.S. has skyrocketed since the 1960s, and more and more of them are looking to the court as yet another way to make their voices heard. Many employ teams of lawyers or have well-developed relationships with pro bono departments at large law firms, or both, in an effort to ensure that for every case in which they have a significant interest, they are able to weigh in.

At this point, many of the members and supporters of those groups now expect them to regularly and consistently file amicus briefs as a way to advance their agenda. And if one of those briefs is cited by the justices in an opinion or mentioned at oral arguments, that can be a particularly valuable victory, allowing the group to tout its role in the outcome of a case and potentially use it as grist for its next fundraising effort.



“From the groups’ standpoint towards their members — they’re doing what they’re expected to do. If you join a public interest group, you expect it to participate in salient cases,” said Paul Collins, a political science professor at the University of Massachusetts Amherst who studies amicus briefs.

And for some of the bigger, more well-known organizations that are frequent filers, if they don’t contribute an amicus brief in a case relevant to their interest, there’s the worry that their silence could be misinterpreted by the court.

During oral arguments in the 2015 bankruptcy case Bullard v. Blue Hills Bank, for example, Justice Elena Kagan noted what she felt was a strange lack of amicus briefs.

“One of the things that confuses me about this case, quite honestly, is why you don’t have more people on your side. In other words, where are the creditors, and where are the amicus briefs from the creditors?”

M.C. Sungaila, chair of the Amicus Curiae Committee of the International Association of Defense Counsel and partner at Haynes and Boone LLP, said Justice Kagan’s inquiry is telling.

“It’s almost like the increase in amicus briefs feeds itself because if you don’t [file], justices may comment on the absence of the brief,” Sungaila said.

The Supreme Court Bar: Driven and Restless

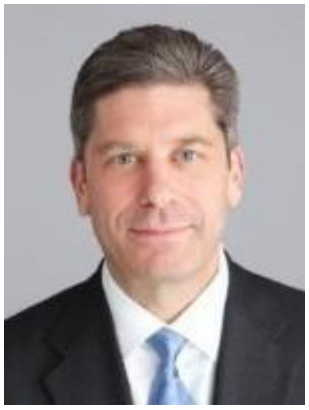
The growth in amicus brief filings can also be chalked up to the rise of a practiced Supreme Court bar, a large and growing group of attorneys at elite law firms who have extensive experience before the high court.

The Supreme Court now takes far fewer cases than it did decades ago. In the 1980s, the justices were still regularly hearing upwards of 150 cases a year, but the decline since then has been steep. In the past few terms, the court has decided between 70 and 75 cases a term. Last year, just 69 cases were decided. As a result, many attorneys who want to maintain an active Supreme Court practice must keep up their presence at the court by writing amicus briefs.

“Because the Supreme Court docket is so thin, for these lawyers simply to have work and be productive lawyers with a Supreme Court practice, sometimes the only way for a Supreme Court lawyer to be involved is through amicus filings,” Devins said.

For each case the Supreme Court decides, there are many more willing, active and driven lawyers with deep knowledge of the court’s inner workings than the few who are called upon to argue each side of those cases.

The 15 firms that filed the most amicus briefs over the past three terms also argued over 30 percent of civil cases at the high court last term, according to Law360 data. Bancroft PLLC’s recent move to Kirkland & Ellis LLP will even further consolidate this group of specialized attorneys.



Mark Perry

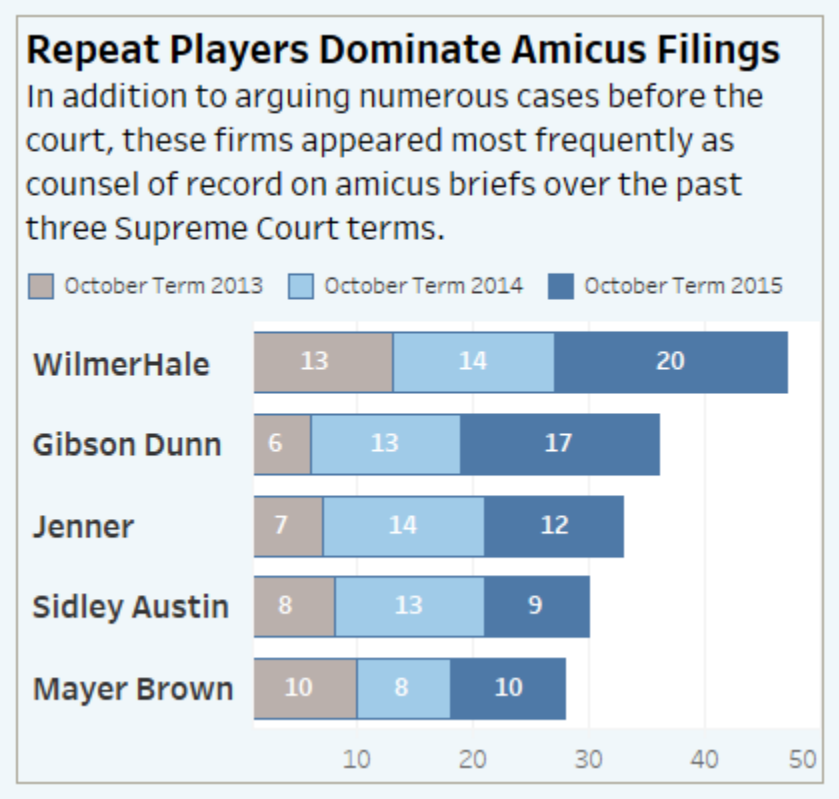
“There’s so few cases overall, that in any particular case there’s lawyers with both expertise and experience who want to be involved, and at the same time there are clients — trade associations, industry groups, consumer groups, government, you name it — with an interest in having their voice heard. So the brief writers, the Supreme Court lawyers, therefore have an opportunity,” said Mark Perry, who is a partner at Gibson Dunn & Crutcher LLP and co-chair of the firm’s nationwide appellate and constitutional law practice group.

The Law Firms Dominating Amicus Filings

That drive to be part of a dwindling number of Supreme Court cases is reflected in the court’s docket, listing the counsel of record on the hundreds of amicus briefs filed over the past three terms. The firms whose attorneys appear most frequently as counsel of record are packed with well-known and practiced Supreme Court advocates.

WilmerHale, in particular, was counsel of record in a striking range of amicus briefs filed over the past three terms, representing the views of members of Congress, industry groups and public advocacy organizations, among others, including 20 in just the past term. Over the past three terms, the court also cited four of those briefs.

One of their briefs appeared in the Whole Woman's Health v. Hellerstedt opinion last term knocking down abortion restrictions in Texas. It was written on behalf of the American College of Obstetricians and Gynecologists and provided information on abortion procedures. Justice Kagan brought another of the firm's briefs into a footnote of her dissent in Town of Greece v. Galloway, a case over opening town board meetings with prayer. She pulled from the amici's discussion of President George Washington's efforts to avoid overtly Christian messages in his public speeches, bolstering her argument on the separation of church and state.



"We're very active at the Supreme Court as party counsel, and our amicus practice is consistent with that. Clients will look to us when they are interested in getting involved in a case," said Catherine Carroll, a partner at WilmerHale. "We have a deep bench of Supreme Court practitioners here, so the bandwidth to do these types of cases is broad."

Appellate practice groups that are well-integrated into large, full-service law firms can offer their services to the broad spectrum of clients served by their colleagues, allowing the law firms to "promote themselves to potential clients as being able to offer all available services all the way up to through the Supreme Court," Devins said.

While writing amicus briefs is typically not a huge source of revenue for a law firm — those are often done on a flat-fee basis or even pro bono — appearing as counsel of record can provide clear business benefits. It adds visibility to the firm and functions as a recruitment tool, not only for prospective clients but also for former Supreme Court clerks or government attorneys looking to find a home for their significant Supreme Court knowledge in private practice.

"The economic incentives [exist] in terms of recruiting lawyers, in terms of recruiting clients, and in terms of just firm self-esteem that comes with having some kind of Supreme Court practice," Devins said.

Amicus writing can also potentially boost revenue by fueling the bulk of a firm's appellate practice — which takes place in the lower federal appeals courts.

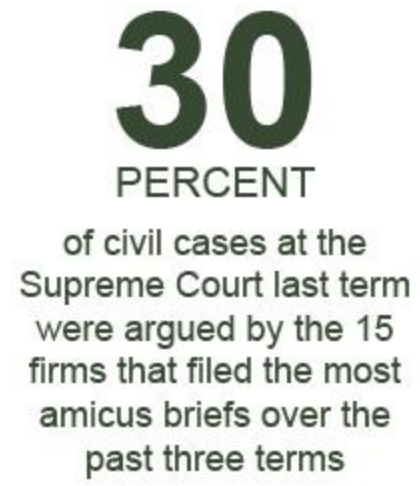
"The money comes in principally from federal appeals practice rather than the U.S. Supreme Court practice, so a lot of what's being built are federal appellate practices," Devins said. Few firms work exclusively on Supreme Court matters, with Goldstein & Russell PC being the notable exception.

For most law firms with a well-known Supreme Court practice, the work of writing amicus briefs also can be self-perpetuating. The more a firm files amicus briefs, the more that type of work comes in the door. Writing an amicus brief can also be a launch pad for up-and-coming attorneys, particularly if they have some success in shaping the court's thinking in a high-profile case.

"It's a really good way for attorneys to build their reputation. People can show their mettle through their amicus briefs," said Neal Katyal, a partner at Hogan Lovells and former acting solicitor general who has argued 28 cases before the Supreme Court.

The Art of Getting Noticed

The reality, though, of having over a thousand amicus briefs filed in decided cases alone in a single term is that there are more briefs than any justice can read. Even the clerk who does read all amicus briefs must have methods of prioritizing and discerning among them.



"I can't say that I read every single one, every page. On some of our cases, we get a hundred," Justice Kagan said at a May meeting of the Judicial Conference of the Seventh Circuit in Chicago, participating in a panel discussion with Judge Diane Wood and retired Justice John Paul Stevens.

"So I have my clerks read every single one, every page. And then they tell me which ones to read, and I read those," Justice Kagan said. "Sometimes on big cases I'll flip through them all and check out the summaries of argument and check out which ones I want to read. Some of them are not worth reading."

At the same event, Justice Stevens said he typically would read amicus briefs from the U.S. solicitor general — calling those "worth looking at" — but otherwise "did not, as a regular matter, read any amicus brief unless my law clerk recommended it."

The late Justice Antonin Scalia was known to take an even harsher view. In a dissent in Jaffee v. Raymond, he wrote of the amici, "There is no self-interested organization out there devoted to pursuit of the truth in the federal courts."

So what does make a law clerk stop, mark a page and pass it on to a justice? What makes a justice pause while flipping through a brief and read more closely?

“We believe as a practice that all our briefs should be short and well under the word limit,” Katyal said. “If it’s concise and to the point, it’s more likely to be picked up.”

Coupling clear, precise language stripped of legalese with a new angle on the legal arguments or a fresh set of facts also helps.

“I think you have to step back and look at the case, and say, here’s my client, here’s the perspective. How can that perspective be used to explain to the court the practical implications, why the ruling makes sense that the clients are seeking?” said Andrew Pincus, a partner at Mayer Brown LLP who has argued 25 cases before the Supreme Court.

Andrew Pincus

Yet the factors at play are not just in the brief itself. They’re also in the names on the cover sheet.

If a law clerk is trying to sort through a stack of amicus briefs and pick out one or two that a justice absolutely has to read, an amicus brief filed by a prominent Supreme Court attorney may provide a welcome signal that draws a closer look.

“There are lawyers at law firms who have track records that, whomever they are filing on behalf of, tend to be read on the theory that they might have something important to say,” said Gibson Dunn’s Perry, who is a former law clerk to Justice Sandra Day O’Connor.

It’s not just well-known counsel that have developed reputations with the court as repeat players with useful perspectives. Organizations like the U.S. Chamber of Commerce, the AARP and the American Civil Liberties Union are frequent amici who work to maintain a reputation of providing advice that is both useful and credible — two qualities that can help a brief stand out in a sea of green.

Six amicus briefs written on behalf of the Chamber of Commerce have been cited in court opinions over the past three terms — more than any other non-governmental amicus group, according to Law360 data.

The Chamber’s amicus brief was cited next to Google Inc.’s in the City of Los Angeles v. Patel opinion, a privacy suit over the warrantless search of business records. It argued that there should be no exception to Fourth Amendment protection of businesses against warrantless searches. The Chamber was also cited in a footnote in Daimler AG v. Barbara Bauman to support the finding that DaimlerChrysler could not be sued in California court for alleged human rights violations and union-busting activities committed in Argentina.

Amicus briefs seen as potentially valuable in the eyes of the court are those filed not only by parties with long-running reputations, such as the ACLU or Chamber of Commerce, but also by coalitions that knit together unexpectedly diverse, bipartisan perspectives into one voice.

“Who is saying it is at least as important as what they are saying,” said Matthew Hellman, a partner in the appellate and Supreme Court practice at Jenner & Block LLP. Hellman authored the influential

amicus brief on behalf of Bipartisan Economists, which was cited three times in the King v. Burwell decision upholding the subsidies provision of the Affordable Care Act.

The strength of the brief, he said, was that it brought together the nation's top economists "of all stripes, [who] served in Republican administrations, Democratic administrations, all making a point."

"[That] is something that can be relied upon by the court as accurate."

One amicus brief filed on behalf of a bipartisan group of former federal officials in the public corruption case McDonnell v. United States last term even drew some half-joking admiration from the chief justice at oral arguments. Officials including White House counsel and attorneys general from each presidential administration going back to Ronald Reagan signed onto a brief stating that the lower court's definition of "official act" would hamper elected officials' ability to interact with the public.

"I think it's extraordinary that those people agree on anything," Chief Justice John Roberts said of the brief during oral arguments — a sentiment that worked its way into the majority opinion.

Putting on the Brakes

Still, part of the process of making sure some amicus briefs stand out from the pack — and are actually discovered by a law clerk and passed on to a justice — often includes vigorous efforts to limit the overall number filed in any one case, including actively discouraging some groups from filing what will effectively be what's often referred to as a "me too" amicus brief.

Katyal of Hogan Lovells took an active role wrangling briefs for his first case before the Supreme Court, Hamdan v. Rumsfeld, a high-profile matter involving the Bush administration's use of military commissions to try terrorist suspects. He described in the Harvard Law Review the hours he spent ensuring "the court was hearing only from a far-flung and diverse set of amici, represented by the best advocates, with the most affected clients, with the most expertise on the issues."

Thirty-nine amicus briefs were filed in support of Katyal's client, Salim Ahmed Hamdan, and the court ultimately ruled in June 2006 that the administration's tactics violated the U.S. Code of Military Justice and Geneva Conventions and were not authorized by Congress.

"It was very time-consuming," he said in an interview. "In a case like that, sometimes it really matters."

More recent filings from many friends of the court, particularly in the past few terms, have given him pause about the utility of some of the briefs filed in many of the hot-button cases. There are some organizations that repeatedly file incredibly predictable briefs, which do little to affect the court's thinking, he said.

"What I've seen for the past several terms is that these are basically a lot of 'me too' filings, and they're done for reasons that don't have much to do with being a true friend of the court, and have more to do with organizations that really just want to say they participated. And that's really unfortunate," Katyal said. "I'm skeptical that the influence of amici briefs is increasing."

Now, he says, he spends a significant amount of time actively advising parties to hold their fire, and his team doesn't as a general rule pitch amicus briefs to clients, he said.

"I do think I spend a huge amount of time in my private practice convincing people not to file. Not because they're going to say something outlandish but because I don't want to burden the court," Katyal said.

Another way litigants try to minimize the court's frustration with overlapping and repetitive amicus briefs is to convince organizations with an active interest in filing amicus briefs to combine their efforts in a single brief. Or at least try to aide in the coordination of arguments to reduce the amount of repetition.

But in some cases, there's little even a highly experienced attorney can do to limit the number of amicus briefs. Anyone can file one, and in some cases, everyone files one, creating a tidal wave of briefs that is nearly impossible to stop.

Over the past three terms, the court's same-sex marriage ruling in Obergefell v. Hodges saw by far the most amicus filings: 153 briefs. The affirmative action case Fisher v. University of Texas garnered the second-highest number of amicus briefs in the same time period: 93. The Fisher case was among three that drew well over 80 amicus briefs last term; the others were Whole Woman's Health and the contraception mandate case Zubik v. Burwell.

"I think most experienced lawyers, once they get cert granted, do the best they can to streamline the number of submissions, but realistically there are times when there's just nothing you can do. It's just a floodgate, and you just go with the flow because there's no way to stop what's going to happen," Sidley Austin's Phillips said.

Despite the rising tide of amicus briefs, the court is unlikely to cap or limit filings. Part of the court's long-standing philosophy is that good ideas can come from anywhere, according to Perry, the Gibson Dunn attorney.

"The court has filtering mechanisms within it — all courts do. They're called law clerks who can go through the briefs and identify either the briefs or the individual arguments within the briefs that may be more persuasive," Perry said.

And Then There Were Nine

Amicus strategies may shift when the Supreme Court does get a ninth justice. Whoever that new member of the court may be, the addition will change the calculations of experienced friends of the court. They'll have to consider differently, particularly at the cert stage, what's likely to persuade the newest member of the court as part of an effort to find the necessary four votes among the justices for a cert petition to be granted.

"It's possible that amicus briefs might arguably be more important for a newer member of the court," said Walter Dellinger, a partner at O'Melveny & Myers LLP who is a former solicitor general. "Justices who have been on the court a long time tend to have become more fixed in their thinking on legal issues. So, that amicus brief that draws attention to social or economic or commercial consequences may be influential in helping to shape the approach of justices who are confronting these issues for the first time."

Walter Dellinger

A ninth justice could even trigger an uptick in amicus filings, because the court will revisit consequential issues that had been previously set on the back burner and because filers will attempt to discern which arguments the new justice finds persuasive, said Hellman of Jenner & Block.

"For someone new who may or may not have seen certain arguments before," Hellman said, "it's conceivable that might affect the amicus participation."

A new justice means learning how to craft and target arguments for a new set of ears, and amici will play a role in that test phase.

"I could certainly see a different set of priorities among those who often file and maybe even those who didn't typically file before," said Carroll, the WilmerHale partner. "Anytime you have a change in the membership, it's going to change how you see the calculus playing out."

Jacqueline Bell and Cristina Violante are data reporters at Law360 who frequently write about the numbers behind the nation's highest court.